Supreme Court, U.S.
JAN 19 2011
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No. 10-946

In The
Supreme Court of the United States

ROBERT BIERENBAUM,
Petitioner,

v.

MARK BRADT,
Superintendent of Attica Correctional Facility,
et al.,
Respondents.

On Petition for a Writ of Certiorari To the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

NATHAN Z. DERSHOWITZ
(Counsel of Record)
VICTORIA B EIGER
Dershowitz, Eiger & Adelson, P C.
220 Fifth Avenue, Suite 300
New York, NY 10001
(212) 889-4009

Attorneys for Petitioner

QUESTIONS PRESENTED

I. In the aftermath of *Crawford v. Washington*, 541 U.S. 36 (2004), and its progeny, do there remain constitutional limitations on the prosecution's use of unreliable out of court statements of non-testifying declarants in criminal trials, and is Petitioner entitled to habeas corpus relief because his conviction was obtained in violation of those limits?

II. What is the proper mode of analysis for the evaluation of trial prejudice in failure to investigate cases?

A. In evaluating prejudice, does the court look at the trial that took place, or the trial that would or could have taken place had counsel performed competently?

B. In evaluating an ineffective assistance claim, does the court look at each act or omission in evaluating prejudice, or must it look at a bigger picture?

C. In assessing prejudice, to what extent may or must the court consider witness credibility, and the weight to be given or the inferences to be drawn from the testimony?

PARTIES TO THE PROCEEDING

The parties to the proceeding in the court whose judgment is sought to be reviewed were respondents Harold C. Graham, Superintendent of Auburn Correctional Facility, and Eliot Spitzer, Attorney General of the State of New York. The present caption reflects that Petitioner was moved to a different facility, and that New York State has elected a new Attorney General, Eric C. Schneiderman.

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OPINIONS BELOW

The Supreme Court of the State of New York, Appellate Division, First Department affirmed the judgment of conviction of the Supreme Court, New York County, in an Opinion reported at *People v. Bierenbaum*, 301 A.D.2d 119, 748 N.Y.S.2d 563 (1st Dept. 2002), set forth at App. 1. The Order of the New York State Supreme Court denying Petitioner's §440 motion for post-conviction relief, dated September 6, 2005, is reported at *People v. Bierenbaum*, 2005 WL 5643796 (N.Y. Sup. Ct. 2005), and is set forth at App. 50. The order of the United States District Court for the Southern District of New York denying Petitioner's §2254 habeas petition, entered on February 25, 2008, is reported at *People v. Bierenbaum*, 2008 WL 515035 (S.D.N.Y. 2008), and is set forth at App. 98. The Opinion of the United States Court of Appeals for the Second Circuit affirming the denial of habeas relief is reported at *Bierenbaum v. Graham*, 607 F.3d 36 (2d Cir. 2010), and is set forth at App. 164. The unreported Order denying a petition for rehearing and rehearing en banc was entered on August 23, 2010, is set forth at App. 210.

JURISDICTION

The Court of Appeals filed its opinion on May 25, 2010. (App. 164) It denied rehearing and rehearing en banc on August 23, 2010.

Justice Ginsburg granted an extension of time to file a Petition for Writ of Certiorari to January 20, 2011. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

[N]or shall any State ... deprive any person of life, liberty, or property, without due process of law ...

The Sixth Amendment to the United States Constitution provides, in pertinent part:

In all criminal proceedings, the accused shall ... have the assistance of counsel for his defence.

28 U.S.C. §2254 provides, in pertinent part:

(D) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

STATEMENTS OF FACTS

An indictment returned in 1999 charged Petitioner Dr. Robert Bierenbaum ("Petitioner") with murdering his wife of three years, Gail Katz Bierenbaum (hereinafter "Katz"). Katz had not been seen after July 7, 1985. Her death was presumed. No body was ever found, and there were neither witnesses to, nor forensic evidence of, any homicidal act.

The People's theory was that, on July 7, 1985, Bierenbaum killed Katz in their Upper East Side apartment, that he transported her body to an airport in New Jersey, rented a small plane, and dumped the body from the plane into the ocean. The People theorized that Bierenbaum strangled Katz, since he allegedly had choked her unconscious 20 months earlier; that he may have cut up her body in the apartment, since he was a surgeon; and that, in the middle of the day, he carried her 110 pound body out of the high-rise building and into his car without attracting the attention of the doorman or anyone else. Nor did anyone see Bierenbaum load anything onto the airplane. Thus, the prosecution theory was a "theory" in its technical sense: a set of assumptions devised to explain a phenomenon, the disappearance of Katz.

When the case reached the Second Circuit on habeas corpus, Second Circuit Judge Calabrese said the case "troubled" him and called the evidence "very thin." (App. 208)

At trial, a medical examiner testified that it was possible for a surgeon to cut up a body in ten

minutes. A police department pilot testified – and a videotape demonstrated – that it was possible for a solo flyer to load, with some difficulty, a package weighing 110 pounds into a plane and dump it without losing control.

Detectives testified that, in accounting for the events of July 7, 1985, Bierenbam omitted mention of his plane rental and his flight that afternoon.[1] A succession of women who Bierenbaum dated in the decade following Katz's disappearance testified that he offered varying theories of Katz's disappearance or demise.

Many witnesses testified to conversations they had with Katz in which she spoke about her marriage and her husband. Witnesses testified that Katz said she was unhappy, scared, and ready to leave. Prosecution witness Maryanne DeCesare testified over objection that Katz told her that Bierenbaum said he would kill her if she left him. Also admitted through DeCesare was Katz's statement that Bierenbaum told Katz that, unlike Claus Von Bulow, he would not leave evidence. (T. 2222-23)

Katz's therapists testified about conversations they had with Katz between 1983 and 1985 in which she talked about the state of her marriage, her fear of Bierenbaum's temper, his erratic behavior, his threats, and an incident in 1983 when Katz told them

[1] Nevertheless, during the initial investigation, the investigators learned that Petitioner had that day rented a plane. Forensic examination of the aircraft, and of the automobile Bierenbaum was using, yielded no results.

Bierenbaum had choked her until she became unconscious.

In addition, three prosecution witnesses testified that Katz told them she had a letter from Bierenbaum's psychiatrist warning her of his future potential for violence toward her. (T. 2140-41, 2388-92, 2441-42)

Katz's hearsay statements were admitted under a hodge-podge of nebulous theories of admissibility – "state of the marriage", "state of mind," "future intent," "identity," as a "Molineux concept,"[2] and as proof of Bierenbaum's motive or intent – over evidentiary and Constitutional objections that those hearsay statements were inadmissible, unreliable, and highly prejudicial. (*E.g.*, T. 2206-07)

Bierenbaum, who has always maintained his innocence, put the State to its proof. As Bierenbaum had stated many times, he contended that he and Katz had argued on July 7, after which she walked out of the apartment, headed for Central Park. He did not know what happened after she left, but thought she may have fallen victim to foul play. Yet, advancing the prosecution's case against him, in his *opening statement,* Petitioner's counsel *conceded* that Katz died on July 7, 1985, a fact at the very heart of the *prosecution's* case and an essential element of the

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[2] *People v. Molineux,* 188 N.Y. 264 (1901), is the seminal New York case which sets forth the purposes for which a defendant's criminal and other bad acts may be admissible, such as to prove motive, intent, or absence of mistake or accident.

murder offense charged. (T. 1881, 1885, 3117-18, 3166)

In support of his position that Katz left the apartment alive as Bierenbaum maintained, the defense called Joel Davis, who had called Missing Persons upon seeing a poster with Katz's photo, and who had been interviewed by the police about his sighting. Davis testified that he had seen Katz – the woman on the Missing Persons poster – in the afternoon on the day of her disappearance, in a bagel shop near where Davis worked.

There were other witnesses who would have corroborated Davis's testimony, two witnesses who had heard or seen Katz leave the couple's apartment, but *their testimony was never presented to the jury.*

Six months before opening statements, pursuant to its *Brady* obligations, the prosecution advised defense counsel that June Sherman, who lived in the apartment directly below the Bierenbaums, had provided exculpatory information to an investigator on April 30, 1998. According to the report:

> On the day of Gail's disappearance, which was a Sunday morning, Mrs. Sherman heard Gail screaming and Robert yelling. She did not know what they were saying. Mrs. Sherman heard a loud bang and then, it was absolutely quiet after that. Mrs. Sherman assumed that the bang was the front door, but it could have been an inner door. All of the doors in the apartment are heavy.

(D.C. Dkt. 1, Ex. B:G)

In fact, the information Sherman had was even more powerful than the disclosed report indicated: in an affidavit she provided in connection with post-conviction proceedings, she maintained that she heard Katz's high heels on the floor above her, and had then heard *the door of the apartment close.* Based on Sherman's "familiarity with Katz's footsteps and voice," Sherman "believe[d] Katz left the apartment when the door slammed." (*See* App. 212)

Though the *Brady* material included Sherman's current address and telephone number – she had moved to Arizona before Bierenbaum's trial began – *defense counsel never sought to interview Sherman before trial.* Nor, prior to trial, had defense counsel subpoenaed Sherman, contacted her to ascertain her availability, or advised her she would be called to testify.

Only after the jury was selected and trial was underway did defense counsel take the first step to seek Sherman's attendance. Affirming that her testimony was necessary and material, counsel applied for and received a court order calling for her attendance as a witness at trial. One single attempt was made to serve Sherman and it was unsuccessful. Thus, the trial concluded without defense counsel having spoken to Sherman, and without the jury having heard what she heard from the apartment above her on the day Katz disappeared.

Before trial, the defense did interview Pablo Alvarez, a 33 year employee in the building in which

Katz and Bierenbaum lived. In a sworn statement Alvarez gave after the trial, Alvarez stated that on the summer Sunday in 1985 when Katz disappeared, having relieved the doorman, he saw Katz exit the building. He had given this information to investigators or lawyers for the defense. Though available to testify at Bierenbaum's trial, Alvarez was not called to testify.

On direct appeal, Petitioner challenged the sufficiency of the evidence and the admission of the statements purportedly made by Katz. He argued, among other things, that her out of court statements were not reliable and that their admission violated his rights under the Confrontation Clause. (*See* Def. App. Div. Brf. at 75-78)

The Appellate Division, First Department, affirmed, holding the evidence to be legally sufficient.

> That the victim died July 7, 1985 is *conceded*. That defendant was the last person *who saw her*, and who was known to have been alone with her until 11:00 A.M., cannot be persuasively disputed *on the basis of this record*.

(App. 2-3, emphasis added)

The Appellate Division also rejected defendant's challenge to the admission of Katz's hearsay statements, holding that, with one exception that constituted harmless error, there was no error admitting them. It ruled that "the reliability of this evidence, initially a question for the [trial] court to resolve, is amply supported by the record." (App. 37)

It noted that the statements were "spontaneous"; were "repeated" to various people; were a "natural consequence of corroborated facts about their marriage"; that Katz was "in good mental health"; that there was "no reason for her to have fabricated the matters"; that the statements concerned "private matters" one would be embarrassed or reluctant to disclose to others; and that there was no coercion or questioning by anyone, and no attempt by her to curry favor. (App. 37)

After the New York Court of Appeals denied leave to appeal, and this Court denied certiorari, Petitioner sought state post-conviction relief, contending, *inter alia*, that his trial counsel was constitutionally ineffective. Among other things, Petitioner claimed counsel was deficient in conceding in his opening statement that Katz died on July 7, 1985, failing to interview June Sherman before trial, and failing to present Sherman and Pablo Alvarez as trial witnesses.

In post-trial affirmations, neither of Bierenbaum's attorneys offered a tactical or strategic reason for having failed to interview Sherman before trial. In fact, in their application to the court for an order requiring her attendance at trial, defense counsel had represented that Sherman's testimony was both material and *necessary* to the defense.

The attorney who handled the trial stated that, had he known that Sherman would have testified consistent with the affidavit she executed post-trial, he would have called both her and Alvarez to the stand. Petitioner's other attorney attested that, if Sherman's testimony existed, he would have urged

that Pablo Alvarez be called as a defense witness, too. (D.C. Dkt. 1, Ex. B:M ¶4)

Purporting to explain his *concession* that Katz died on July 7, 1985, defendant's trial attorney contended he made a strategic decision "because I believed that this would prevent the People from eliciting testimony from her family and friends in the nature of the impact of the victim's death on her family and friends." (D.C. Dkt. 1, Ex. B:M ¶12)

The Supreme Court, New York County, Trial Term, denied Bierenbaum's application for post-conviction relief, without a hearing. (App. 50) Citing *Strickland v. Washington,* 466 U.S. 668 (1984), but purporting to analyze the case under the "higher" and "more flexible" state standard, Judge Ruth Pickholz concluded "that the defendant was afforded meaningful representation under the New York State Constitution." (App. 55)

Judge Pickholz did not analyze the claim with reference to the two-pronged *Strickland* standard, nor did she explicitly address defendant's failure to investigate claim, that is, his claim that counsel should have interviewed June Sherman before trial and before deciding on defense witnesses and trial strategy.

Judge Pickholz stated:

> Although it would have been prudent to speak with Ms. Sherman at an earlier date, the defense made diligent efforts to secure her attendance as soon as the trial actually began. The People's case

> lasted more than two weeks, and it would have been reasonable to believe that she would be available in time to be interviewed and, if she proved to be a friendly witness, testify. That the efforts of defense counsel proved unavailing is not an indication of ineffectiveness. *People v. Donovan* (184 AD2d 654), upon which defendant relies for the contrary proposition, is inapposite. (App. 70)

She continued:

> Moreover, their decision not to rush to interview her can be explained by the fact that they already knew what she had told the prosecution's investigator, and considered her an unfriendly witness. (footnote omitted). (App. 70)

Their basis for that assumption, counsel stated in an affidavit, was that Ms. Sherman did not reach out to contact *them*. (App. 71, n.10)

Addressing the effect of the failure to present Sherman's testimony, she said:

> Whether or not their assessment of her hostility was correct, had she testified, it is as likely that her testimony would have hurt the defense as aided it. Not only was her account of the click of heels

> followed by the slam of a door completely inconsistent with defendant's statements to the police that his wife was wearing sandals when she left the apartment, but she told investigators that she only believed that it was the front door that she heard slam and that it could have been any door. If the jury believed that she had heard the sounds of "Gail screaming and Robert yelling," followed by the slam of an interior door and sudden silence, it would have undermined the scenario suggested by the defense and strengthened the prosecution's theory that the defendant had killed her in the apartment. At the very least her report of the Bierenbaum's incessant cat-and-dog fights and her account of the screams and yelling she heard that morning would have been harmful to the defense. (App. 71)

Judge Pickholz added:

> I also note that Ms. Sherman's inability to provide investigators with *any* relevant information about the day of the disappearance immediately after the event but ever-improving recall of detail as the years have [sic] would also have presented problems for the defense. Had she testified it would have been especially difficult for Mr. Lewis to employ the argument he made in summation that it was dangerous to rely

> upon recent memories of ancient events. (App. 71)

She concluded:

> Trial counsel were therefore not ineffective for failing to obtain her testimony. (*See People v. Llanos*, 13 AD3d 76; *People v. Brooks*, 283 AD2d 367). (App. 71)

Judge Pickholz also ruled that trial counsel "made a strategic decision" not to call Pablo Alvarez "in the absence of credible evidence buttressing" his contention that he saw Katz leave the building. (App. 71) She noted, but did not address, trial counsels' sworn statements that that they *would have called* Alvarez if they had gotten Sherman's testimony. (App. 71)

The judge called the concession that Katz died on July 7 "questionable," and stated, "Although concessions that are based upon a valid trial strategy cannot form the basis for a determination that an attorney was ineffective..., the logic underlying trial counsel's explanation for this concession is somewhat tenuous." (App. 74-75) But, suggesting that the concession did not prejudice the Petitioner, she wrote, "the circumstances surrounding the disappearance of Ms. Katz as well as other evidence in the case nevertheless compel the conclusion that she indeed died on July 7." (App. 75)

The New York Court of Appeals denied leave to appeal Justice Pickholz's decision. *People v. Bierenbaum*, 6 N.Y.3d 892, 850 N.E.2d 674 (2006).

Petitioner timely sought relief under 28 U.S.C. § 2254 in the United States District Court for the Southern District of New York, claiming that he was denied his Sixth Amendment right to effective assistance of counsel and that the admission of hearsay statements violated his rights to confront the witnesses under the Sixth Amendment's Confrontation Clause.

The district court denied habeas corpus relief, without a hearing. (App. 98) Without addressing defendant's failure to investigate claim, the district court ruled that counsel's performance was neither deficient nor prejudicial. (App. 138-53) The district court further ruled that Katz's out of court statements were not "testimonial" and that their admission therefore did not implicate the Confrontational Clause. (App. 154)

After granting a certificate of appealability, the Second Circuit affirmed the denial of habeas relief. (App. 164)

It held that Petitioner's Confrontation claim had to be evaluated under *Ohio v. Roberts*, 448 U.S. 56 (1980), which set forth the clearly established rule when Petitioner's claim was adjudicated on the merits, and when his conviction became final. (App. 185-86) Under *Roberts*, the statements of an unavailable hearsay declarant were "admissible only if [they bore] adequate 'indicia of reliability,'" a standard that could be satisfied by demonstrating that the evidence fell "within a firmly rooted hearsay exception," or that the evidence had "particularized guarantees of trustworthiness." 448 U.S. at 66.

The Court of Appeals ruled that Katz's statements were admissible because there were adequate indicia of reliability. The Court quoted the state court's decision, and concluded that, "It was not unreasonable for the Appellate Division to conclude that the reliability of Katz's statements was "amply supported." (App. 188)

The Court of Appeals affirmed the denial of relief on Petitioner's ineffective assistance claims, likewise failing to address the failure to investigate claim. Treating the failure to *interview* Sherman solely as a failure to *call* the witness, the Second Circuit ruled that Petitioner had not shown prejudice:

> Sherman's testimony would not have undermined confidence in the jury's guilty verdict. Sherman would have testified that she believed Katz left the apartment after the door slammed. She would have had to admit that she did not see Katz leave, nor could she be sure that the door was the exterior door, rather than an interior door. The prosecution would have argued that even if the jury believed Sherman was testifying truthfully about what she heard, her testimony was consistent with the prosecution's theory that Bierenbaum killed his wife in the course of an explosive argument. (App. 197)

Petitioner's motion for rehearing and rehearing en banc was denied by the Court of Appeals for the Second Circuit on August 23, 2010. (App. 210)

By order dated October 20, 2010, Justice Ginsburg extended Petitioner's time to file his petition for certiorari to January 20, 2011.

REASONS FOR GRANTING THE WRIT

POINT I

CERTIORARI SHOULD BE GRANTED TO DETERMINE WHETHER THERE REMAIN CONSTITUTIONAL LIMITATIONS ON THE USE OF NON-TESTIMONIAL STATEMENTS OF NON-TESTIFYING DECLARANTS IN CRIMINAL TRIALS AND WHETHER PETITIONER'S CONVICTION WAS OBTAINED IN VIOLATION OF THOSE LIMITS

This case presents two highly cert-worthy questions that arise in the wake of *Crawford v. Washington*, 541 U.S. 36 (2004), and its progeny. First, do there remain constitutional limitations on the use, against criminal defendants, of non-testimonial hearsay statements of non-testifying declarants. Second, is this Petitioner entitled to habeas corpus relief because his state conviction was obtained in violation of those constraints.

A. The Due Process Clause of the Fourteenth Amendment Proscribes the Use, Against a Criminal Defendant, of Unreliable Out-of-Court Statements by Declarants Who Are Not Subject to Cross-Examination.

Out of court statements are, with certain exceptions, presumptively unreliable. See *Bourjaily v. United States,* 483 U.S. 171, 179 (1987); *Idaho v. Wright,* 497 U.S. 805, 816-17 (1990); *Lee v. Illinois,* 476 U.S. 530, 543 (1986). The Court's jurisprudence also establishes that, in a variety of contexts, the Due Process Clause is violated when the adjudication of important rights rests on unreliable evidence or evidence the reliability of which cannot be adequately tested.

In the decades before *Crawford,* the constitutional implications of the use of "presumptively unreliable" hearsay against a criminal defendant were analyzed, almost exclusively, under the Confrontation, rather than the Due Process, Clause. *Ohio v. Roberts,* 448 U.S. 56, 66 (1980), held that the Confrontation Clause is not violated by the admission of out-of-court statements if they bear adequate "indicia of reliability," even if the declarant is not available to testify in court.

Subsequent re-interpretation of the Confrontation Clause, based upon analysis of the historical record, has re-drawn the Confrontation Clause's scope and protections. *Crawford v. Washington,* 541 U.S. 36 (2004), *overruling Ohio v. Roberts,* and *Crawford's* progeny, *Davis v. Washington,* 547 U.S. 813 (2006), and *Whorton v. Bockting,* 549 U.S. 406 (2007), establish that the *Confrontation Clause* imposes no limitations whatsoever on the use of non-testimonial hearsay.

The absence of rights under the Confrontation Clause does not mean that there are no Constitutional

limitations on the use of non-testimonial hearsay. In a variety of situations, including situations in which a defendant has no Confrontation Clause rights, he nevertheless enjoys rights under the Due Process Clause, including the right not to be convicted upon evidence that is unreliable.[3] Cross-examination, which tests the reliability of evidence by "rigorous testing," *Maryland v. Craig*, 497 U.S. 836, 845 (1990), is not available where, as here, the declarant did not testify.

Individually and collectively, this Court's precedents establish a substantive reliability threshold, premised on due process, for the admission of inculpatory evidence, for determining the fairness and the adequacy of the proof in a criminal trial, and for evidentiary admissibility and sufficiency determinations in quasi-criminal and other proceedings in which the Confrontation Clause does not apply but in which important rights are adjudicated.

Due process requires that evidence admitted against a defendant carry some minimum indicia of reliability. *See Manson v. Brathwaite*, 432 U.S. 98, 114 (1977); *Moore v. Illinois*, 434 U.S. 220, 227 (1977); *Neil v. Biggers*, 409 U.S. 188, 198 (1972); *Cf.*, *Townsend v. Burke*, 334 U.S. 736, 740-41 (1948). *See also California v. Green*, 399 U.S. 149, 164 n.15 (1970)

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[3] *But see* Jules Epstein, *Cross-Examination: Seemingly Ubiquitous, Purportedly Omnipotent, and "At Risk,"* 14 Widener L.Rev. 427 (2009) ("the successive decisions of [*Crawford*, *Davis*, and *Whorton*] raise the specter of there being no constitutional restrictions on state evidentiary rules that admit 'non-testimonial' hearsay evidence.").

("[W]e may agree that considerations of due process, *wholly apart from the Confrontation Clause*, might prevent convictions where a reliable evidentiary basis is totally lacking" (emphasis added); *id.* at 187 n.20 (Harlan, J., concurring)). *Compare West v. Louisiana*, 194 U.S. 258 (1904)(prior recorded testimony under oath and subject to cross-examination is sufficiently reliable to satisfy standards of due process), *overruled on other grounds, Pointer v. Texas,* 380 U.S. 400 (1965), *with United States v. Shoupe*, 548 F.2d 636, 643-44 (6th Cir. 1977) (disavowed, unsworn, and uncorroborated hearsay statement is insufficiently reliable to satisfy due process).

Thus, unreliable eyewitness testimony is inadmissible in a criminal prosecution. *See Manson; Biggers; Stovall v. Denno*, 388 U.S. 293 (1967); *Gilbert v. California*, 388 U.S. 263 (1967); *United States v. Wade*, 388 U.S. 218 (1967). Similarly, one reason for the exclusion of coerced confessions is the recognition that such confessions are unreliable. *Stein v. New York*, 346 U.S. 156, 182 (1952) ("The tendency of the innocent, as well as the guilty, to risk remote results of a false confession rather than suffer immediate pain is so strong that judges long ago found it necessary to guard against miscarriages of justice by treating any confession made concurrently with torture or threat of brutality as too untrustworthy to be received as evidence of guilt."), *overruled on other grounds, Jackson v. Denno,* 378 U.S. 368 (1964).

In proceedings other than criminal trials, where the Confrontation Clause has no application but where important interests are at stake, due process prohibits decision-making based on unreliable evidence. Thus, while the Confrontation Clause does

not apply to sentencing proceedings, a baseline of reliability still applies in determining evidentiary admissibility. *See Specht v. Patterson*, 386 U.S. 605 (1967); *Gardner v. Florida*, 430 U.S. 349 (1977). *See also United States v. Reme*, 738 F.2d 1156, 1167 (11th Cir. 1984), *cert. denied*, 471 U.S. 1104 (1985) (collecting cases and affirming use of "out of court information" at sentencing "so long as the defendant is afforded an opportunity to refute it, *and it is reliable.*") (Emphasis supplied).

Due process rights to ensure evidentiary reliability have also been found to apply in parole revocation proceedings that are held long after a criminal prosecution has concluded, and thus beyond the reach of the Confrontation Clause. *Morrissey v. Brewer*, 408 U.S. 471 (1972), requires a threshold of evidentiary testing to minimize the risk of erroneous adjudication results in parole revocation proceedings.

The same concerns have led to the recognition of due process limitations on the evidence admitted in deportation proceedings, a completely non-criminal process, and beyond the Confrontation Clause's reach. *See Bridges v. Wixon*, 326 U.S. 135, 153-54 (1945)(criticizing the substantive use of inconsistent statements as substantive proof because '[s]o to hold would allow men to be convicted on unsworn testimony of witnesses, a practice which runs counter to the notions of fairness on which our legal system is founded."); *Alexandrov v. Gonzales*, 442 F.3d 395 (6th Cir. 2006); *Anim v. Mukasey*, 535 F.3d 27, 31 (4th Cir. 2004). *See also Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) (setting a gate-keeping function for trial judges to ensure that

evidence lacking in fundamental reliability is excluded, even in civil proceedings).

Thus, this Court should grant certiorari in this case and eliminate the uncertainty engendered by the *Crawford, Davis, Bockting* line of cases. *See* n. 3, *supra*. It should confirm that the Due Process Clause sets limits on the receipt into evidence of unreliable out of court statements by an unavailable or non-testifying declarant. The Court should entertain Petitioner's claim that his conviction was obtained in violation of those due process rights because highly prejudicial and unreliable hearsay – his wife's out of court statements – was used against him at his murder trial.

B. Petitioner is Entitled to Habeas Corpus Relief Because His Conviction Rests on Unreliable Hearsay

Though Petitioner, understandably, framed his Constitutional claim by reference to the Confrontation Clause, not the Due Process Clause, that is no bar to relief under 28 U.S.C. § 2254. A Confrontation Clause challenge to a state conviction is *necessarily* a claim that rests on the Due Process Clause of the Fourteenth Amendment, since it is through the Due Process Clause that the protections of the Sixth Amendment have been incorporated and held applicable against the states. *Pointer v. Texas*, 380 U.S. 400, 406 (1965). *See* generally Jerold H. Israel, *Free-Standing Due Process and Criminal Procedure: The Supreme Court's Search for Interpretive Guidelines*, 45 St. Louis U. L. J. 303 (Spring 2001).[4]

[4] The earlier Confrontation Clause case law should, therefore, in the post-*Crawford* world, be recast as due process cases ..."

The state court had a full and fair opportunity to adjudicate Bierenbaum's claim that he was deprived of a fair trial because unreliable and highly prejudicial hearsay was introduced against him. The state appellate court recognized that the constitutionality of Petitioner's conviction turned upon the reliability of his wife's out of court statements. On direct appeal, the state court ruled that Katz's statements bore sufficient indicia of reliability. *See* pp. 8-9 *supra*.

The Second Circuit likewise addressed Petitioner's lack-of-reliability claim under *Ohio v. Roberts*, the Supreme Court law in effect at the time of the state court proceedings.[5] (App. 185-88)

Andrew E. Taslitz, *What Remains of Reliability: Hearsay and Freestanding Due Process After Crawford v. Washington*, 20 Crim Just. 39, 41 (Summer 2005)

[5] The Second Circuit held that this Court has construed § 2254(d)(1) to mandate that federal courts decide habeas corpus petitions with reference to the Court's jurisprudence as of the date of the pertinent state court adjudication on the merits or the date when the state court conviction became final. (App. 186) *See Williams v. Taylor*, 529 U.S. 362, 412 (2000) (O'Connor, J., for the Court). But, as far as we have been able to ascertain, the rule has not been applied where, as here, at least with respect to non-testimonial hearsay like the statements at issue here, the Court's jurisprudence law has become *less* protective of the defendant with passage of time.

Petitioner submits that the Second Circuit correctly applied Supreme Court jurisprudence on this subject, but acknowledges that the question is not free from doubt.

Whether or not the challenged evidence was sufficiently reliable that its admission did not violate Petitioner's Constitutional rights is a question that likewise deserves this Court's consideration, in light of the uncertainties created by the abrogation of *Ohio v. Roberts*. Like the highly prejudicial statements at issue in *Shepard v. United States*, 290 U.S. 96, 98 (1933)(reversing murder conviction because the wife's statements were inadmissible hearsay), Katz's hearsay statements were highly prejudicial accusations from the grave.

On their face, the factors to which the state court referred in concluding there were indicia of reliability gave no assurance of reliability. Under the criteria the court listed, any gossip or venting of criticism of a spouse or other individual would be deemed reliable, when common sense and common experience show just the opposite to be true. In this very weak case, introduction of this evidence was obviously prejudicial and led to a verdict that is as unreliable as the evidence adduced by the prosecution to support it.

POINT II

CERTIORARI SHOULD BE GRANTED TO CONSIDER THREE IMPORTANT QUESTIONS CONCERNING THE PROPER MODE OF ANALYSIS FOR THE EVALUATION OF TRIAL PREJUDICE IN FAILURE TO INVESTIGATE CASES

In the years since *Strickland v. Washington*, 466 U.S. 668 (1984), was decided, this Court has considered claims that defense counsel engaged in an inadequate investigation that prejudiced the defendant in connection with the sentencing phase of capital trials, most recently in *Sears v. Upton*, 130 S.Ct. 3259 (2010)(per curiam). *See also Porter v. McCollum*, 130 S.Ct. 447 (2009)(per curiam); *Wong v. Belmontes*, 130 S.Ct. 383 (2009)(per curiam); *Bobby v. Van Hook*, 130 S.Ct. 13 (2009)(per curiam); *Schriro v. Landrigan*, 550 U.S. 465 (2007); *Rompilla v. Beard*, 545 U.S. 374 (2005)(prejudice not contested); *Wiggins v. Smith*, 539 U.S. 510 (2003); *Bell v. Cone*, 535 U.S. 685 (2002). The Court has not given like attention to the issue of deficient pretrial investigation and the prejudice it may generate, where what is at issue is counsel's conduct before and during the guilt phase of a trial.[6]

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[6] In *Harrington v. Richter*, Case No. 09-587, argued on October 12, 2010, this Court may address related issues: counsel's failure, pretrial, to consult experts and/or to present expert testimony at trial, and resulting prejudice.

This case presents three important, interrelated questions relating to the prejudice prong of *Strickland* where defendant's counsel failed to conduct a mandated pre-trial investigation.

First, is the evaluation of prejudice to be made by considering the trial that took place, or the trial that could or would have occurred had a competent investigation been conducted?

Second, should the potential effects of counsel's acts or omissions at trial be evaluated cumulatively, or should the effect of each act or omission be considered separately?

Third, what is the proper role of a post-conviction court in assessing witness credibility and drawing inferences from testimony in the context of an ineffective assistance claim?

Strickland itself sets forth the *general principles* governing prejudice that apply across the board in both capital sentencing and trial contexts.

> When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt. When a defendant challenges a death sentence such as the one at issue in this case, the question is whether there is a reasonable probability that, absent the errors, the sentencer – including an appellate court, to the extent it independently reweighs the evidence –

> would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.
>
> In making this determination, a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury. Some of the factual findings will have been unaffected by the errors, and factual findings that were affected will have been affected in different ways. Some errors will have had a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture, and some will have had an isolated, trivial effect. Moreover, a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support. Taking the unaffected findings as a given, and taking due account of the effect of the errors on the remaining findings, a court making the prejudice inquiry must ask if the defendant has met the burden of showing that the decision reached would reasonably likely have been different absent the errors.

466 U.S. at 695-96. This case presents an appropriate and compelling vehicle for consideration of what this *means* – what mode of analysis applies – where an inadequate pretrial investigation was conducted.

In this case, ignoring *Brady* information that the prosecution placed in their hands, defense counsel performed a patently inadequate investigation that affected the trial in several identifiable ways, including their selection of trial witnesses and framing of the opening statement. Among other things, because of defense counsels' failure to investigate, the jury did not hear an unbiased earwitness testify that she heard the supposedly-already-murdered victim leave the upstairs apartment *alive*.

Yet defendant's ineffective assistance claims were rejected, and his murder conviction stands, even though the evidence of guilt was weak, and serious questions linger about whether he had anything to do with the disappearance of his wife 15 years before his trial.

In the days, weeks, and months following Katz's disappearance, defendant told others, including police investigators, that he and his wife had argued, that she stormed out of the apartment, and that she just did not return. Although exculpatory information was given to defense counsel pursuant to *Brady*, counsel failed to contact or interview a witness who would have supported the defense position that Katz left the couple's high-rise apartment under her own steam. Downstairs neighbor June Sherman had *heard* Katz's noisy exit, and was perfectly willing to testify about it if only defense counsel had contacted her.

This was *critically* important information, given the prosecutor's circumstantial case, the 15-year delay between Katz's disappearance and the trial, Petitioner's defense, and the burden resting on the

prosecution to prove guilt *beyond a reasonable doubt*. This was especially so because defense counsel told the jury that Katz was seen by Joel Davis later that day on the East Side of Manhattan; Davis' sighting was the heart of defense counsel's opening statement.[7] Another witness, Pablo Alvarez, who was *not* called, could have confirmed seeing Katz leave, and, in post-conviction proceedings, defense counsel agreed Alvarez would have been called had Sherman testified.[8]

Defense counsels' failure to speak to June Sherman before choosing their witnesses and framing the opening statement was classic deficient performance. Counsel have a duty under the Sixth Amendment to make reasonable investigations or to make a reasonable decision that makes particular investigation unnecessary. *Strickland*, 446 U.S. at 691; *Williams v. Taylor*, 529 U.S. 362, 395-96 (2000); *Wiggins v. Smith*, 539 U.S. 510, 523 (2003); *Kimmelman v. Morrison*, 477 U.S. 365, 385 (1986). Where counsel ignores "pertinent avenues of investigation," the decision not to investigate is not a

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[7] "What is disputed by us, so it's clear, is that Gail Katz-Bierenbaum on July 7th, sometime after 11.00 in the morning was alive. She was alive. She was seen by a man named Joel Davis, who you will hear testify. Joel Davis says – after the posters and the television programs looking for Gail Katz-Bierenbaum were put out, Joel Davis called Detective O'Malley–called Missing Persons and said, 'Some time between one o'clock and three p m. on July 7th, that Sunday, I saw Gail Katz-Bierenbaum. I saw her at H&H Bagel on the East side of Manhattan,' and he tells Missing Persons that." (T. 1882)

[8] Defense counsels' position was never controverted, nor their credibility challenged.

reasonable professional judgment. *Porter*, 130 S.Ct. at 453.[9]

Thus, speaking to Sherman before trial would not merely have been "prudent," as the state court suggested. (App. 147) It was Constitutionally required.

A. In Evaluating Prejudice, Does the Court Look at the Trial That Took Place, or the Trial That Would or Could Have Taken Place Had Counsel Acted Competently?

In evaluating defendant's ineffective assistance claim, the state court (and the federal court on habeas) looked at the trial *that occurred*, and not the trial that *could have been*. Thus the court did not consider that, had counsel discharged his duty to the defendant, a different and far more forceful opening statement would have been made. That opening would have alerted the jury to the fact that *three* witnesses – Sherman, Alvarez,[10] and Davis – would

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[9] Where a criminal defense lawyer affirmatively selects a defense theory of the case, stands by that theory throughout the presentation of evidence, and relies on that theory in closing argument, the lawyer's failure to investigate *readily available evidence supporting that theory* is unreasonable. *See, e.g., Wiggins*, 539 U.S. at 526-29, *Clinkscale v. Carter*, 375 F.3d 430, 443 (6th Cir. 2004), *cert. denied*, 543 U.S. 1177 (2005), *Soffar v. Dretke*, 368 F.3d 441, 473 (5th Cir. 2004), *Pavel v. Hollins*, 261 F.3d 210, 219 (2d Cir. 2001); *Hart v. Gomez*, 174 F.3d 1067, 1071 (9th Cir.), *cert. denied*, 528 U.S. 929 (1999); *Chambers v. Armontrout*, 907 F.2d 825, 828-30 (8th Cir. 1990), *cert. denied*, 498 U.S. 950 (1990); *Harris v. Reed*, 894 F.2d 871, 878-79 (7th Cir. 1990).

[10] Because counsel failed to conduct a Constitutionally adequate investigation, the decision not to call Pablo Alvarez could not

confirm defendant's position that his wife had walked out of their home.

As it stood, there was a single witness who supported the defense position, and his credibility was unremittingly attacked.[11] Without question, then, the failure to investigate affected the entire defense presentation, resulting in the presentation of a far weaker defense than could have been mounted. Seen through this lens – looking at the trial that could have been – the existence of prejudice is, Petitioner submits, undeniable.

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properly be treated as a strategic decision, unchallengeable under *Strickland's* deficient performance prong. "Strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." *Strickland*, 466 U S. at 690 "[S]trategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 U.S. at 690-91.

[11] In closing, defense counsel recognized this, and argued: "Why call Joel Davis? Because he believed he saw Gail Katz Bierenbaum in the afternoon, and you should hear him and he should be tested by the principle of cross-examination, tested by a very able examiner, Mr Saracco, who is able to take Joel Davis through and in some way make Joel Davis look like a fool ... [But] he knew in '85 that's who he thought he saw, and he's got no axe to grind and no reason to come in here except he believed that's what he saw. It well may be that over time, between '85 and the year 2000, Joel Davis looked at Gail Katz Bierenbaum in his memory and she got bigger and better and different. It doesn't mean that when he saw her in 1985 and saw the poster that he didn't see that. ." (T. 3162-63)

B. In Evaluating Ineffective Assistance, Does the Court Look at Each Act or Omission in Assessing Prejudice, or Must It Look at a Bigger Picture?

The state court, essentially rendering counsel's failure to investigate *irrelevant*, looked separately at defense counsel's acts and omissions *during trial*, each in isolation, without consideration of the whole. It analyzed the case as if counsel's deficiency was merely his failure successfully to serve June Sherman with the trial subpoena.[12] *(See* App. 67-71)

The Court should grant certiorari and consider whether that analytical approach, essentially endorsed by the federal habeas courts, is consonant with *Strickland*. Does piecemeal consideration of counsel's acts or omissions satisfy *Strickland's* mandate that courts consider the "entire evidentiary picture"?

There is a split of Circuit authority on this point. The majority of the Circuits, applying *Strickland*, have held that it is appropriate to look at the cumulative effect of multiple instances of deficient performance by counsel when assessing prejudice.[13]

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[12] The state court looked second, and separately, at defense counsel's decision not to call Pablo Alvarez. (App. 67-73) It considered separately, without reference to the evidence that *was* and was not before the jury, defense counsel's concession in his opening statement that Katz indeed died on July 7. (App 73-75)

[13] Other courts have intimated that such an analysis is proper. *See*, e.g., *Seymour v. Walker*, 224 F.3d 542, 557 (6th Cir 2000)("Because the individual claims of ineffectiveness alleged by [the defendant] are all essentially meritless, [she] cannot show that the cumulative error of her counsel rendered him

See, e.g., Washington v. Smith, 219 F.3d 620, 634-35 (7th Cir. 2000)("Evaluated individually, these errors may or may not have been prejudicial to Washington, but we must assess 'the totality of the omitted evidence' under *Strickland*, rather than the individual errors"); *Harris v. Wood*, 64 F.3d 1432, 1438-39 (9th Cir. 1995); *Gonzales v. McKune*, 247 F.3d 1066, 1078 n.4 (10th Cir. 2001) (*Strickland* ... makes it clear that all acts of inadequate performance may be cumulated in order to conduct the prejudice prong."), *vacated in part on rehearing en banc*, 279 F.3d 922 (10th Cir. 2002); *Lindstadt v. Keane*, 239 F.3d 191 (2d Cir. 2001) (counsel's four errors when viewed cumulatively established ineffectiveness.).[14]

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ineffective"), *cert. denied*, 532 U.S. 989 (2001); *McNeil v. Cuyler*, 782 F 2d 443, 451 (3d Cir.)("Upon reviewing the cumulative effect of these actions and omissions, however, we do not think there is a 'reasonable probability' that without them, the result of the trial would have been different."), *cert. denied*, 479 U.S. 1010 (1986).

[14] Though Second Circuit law allows consideration of cumulative prejudice where multiple acts of deficient performance exist, the Second Circuit did not consider cumulative prejudice here, having ruled that the concession regarding the date of Katz's death (and the failure to call Pablo Alvarez) did not constitute deficient performance at all. (App 193, 197-99) Yet, concessions constitute reasonable trial strategy only where the defendant stands to gain something from the concession that could benefit him in a way that outweighs its cost to him. *See, e.g., United States v. Arnold*, 126 F.3d 82, 89 (2d Cir. 1997); *Anderson v. Calderon*, 232 F.3d 1053, 1089-90 (9th Cir. 2000), *overruled on other grounds, Osband v. Woodford*, 290 F.3d 1036, 1043 (9th Cir., 2002) *and cert. denied*, 534 U.S. 1036 (2001); *United States v. Swanson*, 943 F.2d 1070, 1075-76 (9th Cir. 1991)("[i]n some cases a trial attorney may find it advantageous to his client's interest to concede certain elements of an offense").

The Fourth and Sixth Circuits take a contrary position. *See Fisher v. Angelone*, 163 F.3d 835, 852 (4th Cir. 1998)("To the extent this Court has not specifically stated that ineffective assistance of counsel claims, like claims of trial court error, must be reviewed individually, rather than collectively, we do so now."), *cert. denied*, 526 U.S. 1035 (1999); *Girtman v. Lockhart*, 942 F.2d 468, 474-75 (8th Cir. 1991)(rejecting position that, where counsel's errors were individually insufficiently prejudicial to warrant habeas relief, cumulative impact of the errors could establish ineffective assistance of counsel).

C. In Assessing Prejudice, to What Extent May or Must the Court Consider Witness Credibility, and the Weight to Be Given or the Inferences to Be Drawn from the Testimony?

Finally, does a court faced with an ineffective assistance claim assess the credibility of witnesses, the weight of their testimony and the inferences that may be drawn from it. To what extent can the court properly act as a factfinder, and did the state court here overstep those bounds?

The courts' role in evaluating the credibility, the significance, and the impact of testimony of uncalled witnesses has received relatively little judicial attention. The Eighth Circuit has adopted a "hypothetical construct" as the appropriate mode of analysis. *See McCauley-Bey v. Delo*, 97 F.3d 1104, 1105-06 (8th Cir. 1996), *cert. denied*, 520 U.S. 1178 (1997); *Armstrong v. Kemna*, 590 F.3d 592 (8th Cir.), *cert. denied*, 130 S.Ct. 3369 (2010).

The Court "add[s] the testimony of ... uncalled witnesses to the body of evidence actually presented at [the] trial" and considers "(1) the credibility of all witnesses, including the likely impeachment of the uncalled defense witnesses; (2) the interplay of the uncalled witnesses with the actual defense witnesses called; and (3) the strength of the evidence actually presented by the prosecution." *Armstrong*, 590 F.3d at 604-05, *quoting McCauley-Bey*, 97 F.3d at 1106. The test assumes that a court can and should consider the credibility of witnesses, both called and uncalled, and the weight to be given their testimony. The approach also appears to assume that these evaluations are not limited to making a "gate keeping" assessment, that is, determining whether a witness is credible at all.

Strickland nowhere states expressly that courts considering post-conviction ineffective assistance claims should make credibility determinations of any type. On the other hand, assessment of the weight to be given to a witness's testimony may be necessary to do the prejudice analysis *Strickland* mandates, even though that may require taking credibility into account. Yet, a reviewing judge's assessment of credibility and the weight and significance to give testimony is inherently problematic. It is especially so where, as here, the judge deciding the ineffective assistance claim did *not* hold a hearing to hear the uncalled witness testify, and did not hear any of the trial witnesses testify, because she did not preside at the trial.

The extent to which courts may or may not consider the weight to be given an uncalled witness's testimony to determine whether there exists a

reasonable probability of a different outcome presents difficult questions, both theoretical and practical.[15] The state court's implicit resolution of those questions in this case was neither correct nor reasonable, given *Strickland*.

The state court, parsing the testimony it thought Sherman would give based on her affidavit, determined that Sherman was credible, but that parts of her account would arguably have hurt the defendant as much as helped him. However, the Court's recent decision in *Sears v. Upton*, 130 S.Ct. 3259, 3264 (2010), establishes that the fact that bad information is mixed in with the good is unsurprising, and does *not* negate prejudice.

Of equal importance, the state court's parsing effectively placed upon the defendant the precise burden which *Strickland* held a defendant does *not* have to carry. The state court denied relief because defendant failed to convince it that the jury would have *fully* credited what Sherman believed she heard. The state court suggested that factfinders could conclude that Sherman was mistaken about having

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[15] Even the trial courts' gatekeeping role, as, for example, in determining the admissibility of expert testimony, raises difficult questions concerning the respective role of judges and juries. See generally, Edward J. Imwinkelried, *Trial Judges – Gatekeepers or Usurpers? Can the Trial Judge Critically Assess the Admissibility of Expert Testimony Without Invading the Jury's Province to Evaluate the Credibility and Weight of the Testimony?* 84 Marq. L. Rev 1 (Fall, 2000) ("It is commonly said that . . . 'questions of fact' are for the jury . The difficulty is that on close scrutiny, the generalization breaks down.").

heard the apartment's *exterior* door close.[16] According to the state court, if the jury believed that there was screaming and the slam of an *interior door, followed by silence*, it would have strengthened the prosecution's theory that defendant killed her.[17] (App. 70-71) That being so, according to the state court, it was "as likely that [the testimony of Sherman] would have hurt the defense as aided it." (App. 70) In other words, the chances of a different result (no conviction)

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[16] The state court stated that, according to the report turned over as *Brady* information, Sherman "only believed that it was the front door that she heard slam and that it could have been any door." (App. 70) However, Sherman's *sworn statement* was that *she believed that the door she heard slam was the apartment's outer door*, which was made of different material (heavy metal) than the interior doors in the apartment. (D.C Dkt. 1, Ex B:E ¶4) That the State might have challenged the accuracy of Sherman's perception, or her ability to perceive a distinction, does not defeat defendant's ineffective assistance claim. *Conclusive* evidence disproving an element of the state's case or conclusively establishing defendant's innocence is not what *Strickland's* "reasonable probability" test requires. *See Sears v. Upton* (compare majority opinion with dissent, which characterizes some of the new evidence as "still[y]"). *Moreover*, even if the prosecution had been able to suggest that Sherman was *wrong* about which door she heard close, the absence of other sounds in the apartment following the door slam *itself* raises an inference, and would have permitted an argument to the jury, that there was no murder or dismemberment going on.

[17] The state court also stated that Sherman's testimony could have hurt the defense because her "account of the click of heels followed by the slam of a door [was] completely inconsistent with defendant's statements that his wife was wearing sandals when she left the apartment." (App. 70) Yet, there simply was *no inconsistency*, for sandals – open-toed shoes – need not be flats. Sandals can have heels of any height. *See, e.g.*, Zappos.com.

and the chances of the same result (conviction) were in equipoise.

The state court's own findings *compelled* relief under *Strickland*. *Strickland* established that defendant's burden is not to show that it is *more likely than not* that he would not have been convicted. 488 U.S. at 693 (a "defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case."). When, as the state court saw it, the balance was 50-50 – as likely as not – the defendant *has established* the reasonable probability *Strickland* requires, and has satisfied the prejudice prong of the *Strickland* test.

CONCLUSION

Petitioner respectfully prays that his petition for a writ of certiorari be granted.

Respectfully submitted,

Nathan Z. Dershowitz
(*Counsel of Record*)
Victoria B. Eiger
Dershowitz, Eiger & Adelson, P.C.
220 Fifth Avenue, Suite 300
New York, NY 10001
212-889-4009

Attorneys for Petitioner
Robert Bierenbaum

Dated: January 14, 2011

SUPREME COURT, APPELLATE DIVISION

First Dept., October 2002

Richard T. Andrias J.P.
David B. Saxe
John T. Buckley
David Friedman JJ.

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The People of the State of New York,
Respondent,

v.

Robert Bierenbaum,
Appellant.

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OPINION OF THE COURT

Marlow, J.

A jury convicted Robert Bierenbaum of second-degree murder based on circumstantial evidence that on July 7, 1985 he intentionally killed his wife, Gail Katz Bierenbaum, in their Manhattan apartment; transported her body to a New Jersey airport the same day; loaded it onto a small private plane; and piloted it over the Atlantic Ocean where he discarded her remains. Neither her body nor her remains has ever been found.

On this appeal, we address the following four issues:

First, defendant contends the trial evidence is legally insufficient and the verdict is against the weight of the evidence.

Second, defendant complains that the trial court erroneously allowed the jury to learn (a) of the existence and nature of a letter written to his wife by his psychiatrist warning her of the danger defendant posed to her; and (b) of several of her verbal statements to various people describing defendant's threatening remarks and otherwise negative behavior.

Third, he argues that the Trial Justice should have precluded, and that the prosecutor inappropriately used, evidence that defendant choked his wife rendering her unconscious in the autumn of 1983, including evidence of her statements to her cousin over the phone, which the court admitted as "excited utterances."

Fourth, he urges that the court incorrectly allowed the People to introduce opinion testimony by a medical examiner, and demonstrative and opinion evidence by a police pilot and two other experts, that it is possible for a surgeon/pilot, alone, to dismember a 110-pound body in 10 minutes, load a 36-inch-long package containing the body's disarticulated remains onto a small airplane, and, also while alone in the air, throw it into the ocean.

We agree with only one claim of error. However, because we find it harmless, we affirm.

THE CIRCUMSTANTIAL EVIDENCE

That the victim died July 7, 1985 is conceded. That defendant was the last person who saw her, and who was known to *123 have been alone with her until

11:00 A.M. that day, cannot be persuasively disputed on the basis of this record. Contested are the way and reason her life ended, the way her killer disposed of her body immediately thereafter, and her killer's identity and state of mind.

The trial testimony and physical exhibits revealed the following:

In 1982 defendant and the victim married. From the beginning, they quarreled frequently. No witness disputed that their discord and fighting reached a level characterized by threats against the victim and at least one previous violent act by defendant against her. Defendant essentially admitted as much, and was heard to say, more than once, that during one argument there was "physical contact," that their last argument was "explosive" and "severe," and that he was frustrated in his marriage because they argued constantly. He also said that he hated the victim so much, and that she would get him so upset, that he wanted to kill her.

They both complained many times to many people that their marriage was loveless and their life together was stormy. On one occasion a coworker overheard defendant in a common work area arguing loudly with his wife over the telephone. The victim would complain also that defendant tried to exert excessive control over her, and she expressed fear of him more than once. The record is replete with evidence depicting events and statements which motivated the victim to end her marriage. In 1984, she was so unhappy that she consulted a divorce lawyer.

One day in the fall of 1983, at about 3:00 P.M., the victim called her cousin, Hillard Wiese, an attorney, at his office. "[S]peaking in very hushed tones and very rapidly" and "sound[ing] extremely upset," she told him that she and defendant had a fight the night or day before. She said that he, not for the first time, had choked her, although this was the first time she was thereby rendered unconscious. When she came to, he begged her forgiveness and promised it would never happen again. She told Wiese she was speaking quickly and softly because she was expecting defendant. She called Wiese again the following day to let him know she took his advice and was staying with her grandfather.

On another occasion, while the couple was watching a television program about the von Bulow murder case, defendant told the victim that the "problem with Claus von Bulow is that he left evidence and [defendant] would not leave evidence." The testimony revealed that the victim perceived this statement as a threat.*124

The trial record also makes it clear--notwithstanding the victim occasionally vacillated about terminating her marriage--this couple was on the verge of divorce in July 1985. While married to defendant, the victim had an affair with at least one other man; just before the day she disappeared she stated to a friend she was about to tell defendant she wanted a divorce; she had borrowed money to prepare to leave; she said she was seeing one or two other men and that she loved one of them; she was looking for an apartment and was seen with circled newspaper ads for apartment rentals the day before she disappeared and her friend had offered her a place in Connecticut to stay while she got

herself resettled. Defendant himself said his wife told him she wanted a divorce.

The proof is most telling that on the very day the victim disappeared, she intended to confront defendant with her decision to leave him. She was also determined to make it clear to defendant that she would use a letter, written to her by his psychiatrist warning her of the danger he posed to her, in order to humiliate him with his professional peers should he refuse to meet her divorce settlement demands. To that same end, she also planned to threaten to expose his and his father's alleged multimillion-dollar Medicare fraud.

At the time the deceased disappeared, defendant was a surgical resident at Maimonides Hospital and a licensed pilot. On July 7, 1985, at 4:30 P.M., he rented a Cessna 172 plane at Caldwell Airport in Fairfield, New Jersey. He returned it after one hour and 56 minutes, giving him time enough to fly round trip approximately 165 miles over a part of the Atlantic Ocean. From the rental office's vantage point, one would not have been able to see defendant on the tarmac getting ready to board--and possibly load luggage or other items onto-- the plane, which was in a position readily accessible by automobile for such purposes.

Later the same day, around 6:30 P.M., defendant arrived alone at his sister's Montclair, New Jersey home for his nephew's birthday party. There he told his father that he and his wife had an argument earlier that day, that she left for Central Park, and she had not returned by the time he left Manhattan. Significantly, he omitted telling his father that he had

flown an airplane for nearly two hours that very afternoon.

That evening, he went to the home of his friend, Dr. Scott Baranoff. From there, he telephoned his apartment more than once. A seemingly distraught defendant also told Baranoff about the argument, adding that his wife had not yet returned ***125** after having left their apartment wearing shorts, a halter top and sandals. However, he again omitted to mention that he had rented and flown an airplane for almost two hours that same afternoon, a consistent omission whenever he told others about the events of July 7.

When defendant returned to their Manhattan apartment, he telephoned his wife's friend and former psychology teacher, Dr. Yvette Feis. He told her of the argument and that the victim had left for Central Park with a blanket for sunbathing. Defendant and Dr. Feis spoke daily that first week, but during the first few calls she urged him to contact the police and to speak to the doorman.

At 9:00 P.M. the next night (July 8), he finally spoke to Detective Vergilio Dalsass, telling him that his wife left their apartment at 11:00 A.M. on July 7 to sunbathe in Central Park wearing pink shorts and a white t-shirt. He stated he had remained behind in their apartment until 5:30 P.M. before leaving for his sister's New Jersey home.

Before ending that July 8 interview, Detective Dalsass repeated his appeal to defendant to leave out nothing, saying:

"I pretty much told him that any information that will assist in finding Gail was rather important. He was the individual that las[t] saw her in the apartment. Any friends, relatives, anything that could assist me would certainly be very beneficial in locating her as quickly as possible."

Defendant offered that Gail had, years earlier, attempted suicide. Yet, he omitted to tell the detective that he was a pilot and that on the previous afternoon he rented a plane from a New Jersey airport between 4:30 P.M. and 6:30 P.M. for a two-hour flight. He also failed to mention to both Detective Dalsass and later to Detective Thomas O'Malley--as he had indeed told others-- that he allegedly left his apartment Sunday afternoon to search for his missing wife in Central Park and there allegedly found her towel and suntan oil.

For the entire week immediately following the victim's disappearance, defendant failed to return Detective Dalsass' approximately eight telephone answering machine messages. However, on July 10, he called Detective O'Malley inquiring how the investigation was proceeding and met with him on July 13. During that meeting he told O'Malley that he drove his father's Cadillac to his sister's New Jersey home on July 7, instead of his own [smaller] Datsun, as his car allegedly had mechanical problems.*126

Defendant called a number of the deceased's friends voicing expressions of concern that she may have harmed herself, specifically attributing that notion to comments made to him by her therapist, Dr. Sybil Baran. However, Dr. Baran unequivocally denied she had ever said anything like that to defendant or that

she ever discussed anything with him on that subject. To the contrary, it was her professional opinion, based on three years of treating the deceased once or twice weekly, that she was not suicidal.

Defendant also suggested to others that his wife was depressed and thus may have killed herself, disclosing also that she had tried to commit suicide years earlier.

Furthermore, on July 14, while with his wife's friend Maryann DeCesare and a group of friends who were searching for her and posting missing person signs in Central Park and elsewhere, defendant quipped that he thought his wife--who was missing for a full week--was on a shopping spree at Bloomingdale's, adding, "You know what a JAP[FN*] she was." When the search party returned to the marital apartment--only seven days after his wife's disappearance--defendant volunteered to his mother-in-law, in DeCesare's presence, "I wonder why the cat got sick. I had to take the rug out to be cleaned."

Later on July 14, at a meeting at Detective Dalsass' office arranged by the deceased's sister Alayne Katz, and with her parents and defendant's father also present, Dalsass interviewed defendant again face-to-face. The detective specifically made it clear to defendant the importance of omitting nothing in

FN*"*Offensive Slang* A Jewish-American girl or woman regarded as being pampered or overindulged" (American Heritage Dictionary of the English Language 935 [4th ed 2000]).

describing and detailing for him the last three days

his wife and he spent together:

"I opened up with anything that might be instrumental in locating Gail. However minor it might be it was very important. That anything said, however insignificant it could possibly be used to find her and locate her ...

"I told the defendant that he should give me a narration of the time he spent over the last weekend. Not excluding anything from the time he last saw, going back as much as he can ...

"I told him that any information is useful. Anything *127 could be helpful in locating Gail. Something that might be very innocent might develop into a lead where she might be."

Notwithstanding these and other direct, uncomplicated admonitions, defendant omitted telling Detective Dalsass that he and his wife had argued that Sunday morning. However, in the July 8 interview, he had specifically denied that the reason she left the apartment at 11:00 A.M. to sunbathe in Central Park was related to an argument that morning. In addition, he had, the day before (July 13), told Detective O'Malley that he and his wife had argued the night before she "disappeared" and continued arguing on the morning of July 7, prompting her to go to Central Park at 11:00 A.M. to "cool off."

He again omitted on July 14 to tell Dalsass--and O'Malley as well the day before--that he was a licensed pilot, rented a plane in New Jersey, and flew it for two hours from 4:30 P.M. to 6:30 P.M. on July 7.

Instead, he falsely told both detectives, on a total of at least three occasions, that he stayed in his Manhattan apartment all day until 5:30 P.M., emphasizing to Dalsass that he was "positive" that "he left [his apartment] at 5:30 [P.M.]." He also changed his claim that on July 7 he had spoken to the doorman who, he had originally maintained, said he saw the victim leave the building Sunday shortly after 11:00 A.M. In fact, the doorman did not speak to defendant July 7 and could not recall seeing either defendant or the deceased that day.

Further, he told Dalsass, in some detail, that on Saturday afternoon, July 6, while he and Gail shopped at various local stores, they argued about finances and other matters which he refused to disclose. He said the day ended with a Saturday evening, candlelight dinner in their apartment, but he again declined to discuss whether this interlude, described by him as romantic, helped resolve the argument. Detective Dalsass expressed frustration over defendant's lack of cooperation and his delays in returning phone calls and providing the police with information to aid their search efforts.

Furthermore, although defendant told friends he searched for the deceased in Central Park on July 7 between 11:00 A.M. and 5:30 P.M. and found her towel and suntan oil in the park, he never shared that highly significant detail with O'Malley or Dalsass on the two interviews each had held with him during the seven days following July 7. To them he insisted that he had remained in the apartment until 5:30 P.M. without leaving at all.

The record also reveals that, although in July

defendant told Detective Dalsass he would respond to his request to view the apartment, defendant in fact did not contact Dalsass until September 12, 1985, and he did not permit entry until September 30. When Dalsass arrived, the crime scene unit was only allowed to search for fingerprints, the victim's diary and her address book. The investigators were not permitted to check for blood or hair samples or to search for "anything that we could document that a crime took place."

In the days, weeks, months and years following his wife's disappearance, defendant made several inconsistent, unfounded or otherwise suspect and incriminating statements. Among them are the following examples: he told Detective Dalsass that he and his wife had no argument on July 7, but he told Detective O'Malley that they argued on July 6 and continued on the morning of July 7. He told her friend, Dr. Feis, that they had a severe argument the day of her disappearance, more severe than he had originally described to her and to various other people. He admitted that during the July 7 argument he failed to heed his psychiatrist's advice to try to defuse the situation and that this argument on the day she disappeared became "explosive." He told others that he and the victim argued just before she left for Central Park "to cool off"; another that a private investigator he had hired found evidence she was living in California probably with financial help from her family; others that she had a drug problem, that she may have disappeared with drug dealers and that she probably was murdered by her "druggie friends"; others that she may have run off to live with someone in the Caribbean; and others that his missing wife was seen after July 7, 1985 "in some type

of fugue state" in the Central Park area and that it was unlikely she would return.

To one of his Southampton summer housemates in July 1985, with a demeanor described as lacking in emotion, he said he and his wife fought on July 7 and "she had taken a towel and some suntan lotion and had gone to Central Park. She wanted to cool off and he waited a couple of hours and then he went looking for her and he found the towel and the suntan lotion but she was gone." Also, shortly after she vanished, he told his Southampton summer landlord that after his wife left he went through her drawers and found cocaine, prompting him to believe she went off with drug dealers. To yet another, he described his missing wife as a tramp, off living with someone else.

In addition, he made contradictory statements to the police and others about whether he cleaned his living room rug shortly after July 7, telling the police he did not, but telling the victim's friend, Dr. Feis, and others that he had.

A few weeks after his wife disappeared, defendant began dating a nurse whom he knew from Maimonides Hospital where they were employed. In late July or early August, defendant asked her out, and they became intimate on their first date. They saw each other socially about five times over the next six weeks, until she abruptly ended their relationship because, in her view, he unjustifiably "attacked" her verbally one evening in a restaurant. Early in that period, before they began dating, and therefore significantly before the end of September, he falsely told her the police had searched his apartment and car and found him to be "clean." Furthermore, she

testified that, during that early period, he expressed no concern about his wife's disappearance.

Thereafter, commencing in September 1985 and continuing for a period just under one year, defendant invited a medical student, Dr. Roberta Karnofsky, who worked under his direct supervision at Coney Island Hospital, to live with him in the marital apartment. They began dating a month before she moved in. During their entire relationship, she did not observe him make any efforts to locate his missing wife.

Dr. Karnofsky also remembered a phone call defendant received one morning at 3 o'clock, a few months after she moved in. The call came from the police who insisted that he immediately come in to view a woman they had found at the New York Port Authority Bus Terminal, someone they thought might be his missing wife. After he hung up and she asked him whether under the circumstances she should pack her things and vacate the apartment, he told her not to worry because he "doubt [s] it is Gail." Although he had expressed some apparent frustration because the police were insisting he come to the terminal at that hour, he complied. When he later returned, he tersely remarked to his roommate that it was not his wife.

At one point while they lived together, on a day that Dr. Karnofsky was angry or annoyed with defendant, and, having heard a number of accusatory answering machine messages directed at defendant, she confronted him "to see what his reaction [would be]":

"What I said to him was, well, I think that if you did

this and if it really happened as some people *130 seem to think it did, that perhaps something happened in the apartment and you intentionally or unintentionally--Gail was hurt, you could have put her in one of those big flight bags or duffel bags and carried her out of the apartment since she was very small, put her in the back of your car, drive out to the airport and thrown her body out of the plane."

Defendant displayed no reaction, "[h]e didn't say anything."

About midway through their one-year relationship, defendant gave his approval to have Dr. Karnofsky's girlfriend, Sharon, also move into the apartment temporarily. She expressed this homicide theory to Sharon one day while defendant was not home. Together, the two women looked for and found defendant's flight log. In it, they located a handwritten entry which appeared to have been changed from the original notation of July 7, 1985 to the substituted date of August 7, 1985. The jury saw this altered document.

Another woman whom he dated in Las Vegas in 1995 asked him on their first date whether he had ever been married. When he exhibited hesitation in responding to her, she jokingly asked him if he had killed his wife. Defendant was "pretty surprised and stunned" and asked her what she knew. When she asked what had happened, he told her his wife may have committed suicide or may have met with foul play, as she had dated a variety of men. He also disclosed to his date that in the past he had a bad temper, but that it had gotten much better. Finally, she observed that defendant was "meticulous," even

"compulsive," about making flight log entries.

Through the testimony of several witnesses, including four expert witnesses-- New York City's Chief Medical Examiner, an experienced New York City police pilot, an aviation safety inspector, and an airline transport pilot/flight instructor/FAA flight test examiner--the People established that it was physically possible for defendant, a surgical resident and pilot, unassisted, to disarticulate a recently expired body of the victim's size (5 feet, 3 inches tall, weighing 110 pounds) within 10 minutes, pack her dismembered torso and limbs into a flight/duffel bag and carry them through an unmonitored rear exit of his apartment building for a distance of two blocks to his garaged car. They also proved that it was also feasible for him to so transport the bag containing the decedent's remains--whether disarticulated or intact--to Caldwell Airport in Fairfield, New Jersey, and load it aboard a Cessna 172 plane *131 directly from the car parked alongside on the tarmac, all unnoticed. They further established that it was possible for defendant, also alone, to pilot the Cessna 172 over the Atlantic Ocean as much as 85 miles east of the shoreline, maintain sufficient control of this relatively easy-to-operate plane so as to singlehandedly throw these human remains from the air into the ocean, and then land back at the same airport, all in less than two hours of flight time. Without objection, the prosecution showed the jury a videotape specifically prepared for trial, demonstrating how defendant could have accomplished this from the point of loading the 110-pound body onto the plane, discarding it over the ocean, and landing back at the same airport.

DISCUSSION

1. *Reasonable Doubt*

(1) In our role of reviewing the sufficiency of trial evidence as an appellate court in a purely circumstantial evidence case, we must decide whether a guilty verdict is based on legally sufficient evidence by "determin [ing] whether any valid line of reasoning and permissible inferences could lead a rational person to the conclusion reached by the fact finder on the basis of the evidence at trial, viewed in the light most favorable to the People" (*People v Williams*, 84 NY2d 925, 926 [citations omitted]). Judged by that standard, we find and hold that the circumstantial evidence adduced at this trial decisively extinguishes any doubt that defendant Robert Bierenbaum, and no one else, intentionally killed his wife Gail Katz Bierenbaum, brought her body to Caldwell Airport in Fairfield, New Jersey, loaded it onto a small plane, flew it over the Atlantic Ocean, and, there, dumped her remains.

Furthermore, in a case based on circumstantial evidence--as this is--we must also adhere to the dictates of *People v Benzinger* (36 NY2d 29, 32) expressed again in *People v Seifert* (152 AD2d 433, 440,*lv denied*75 NY2d 924) as follows: " [w]hen reviewing a case based exclusively upon circumstantial evidence, the facts must be viewed in the light most favorable to the People [citations omitted], and it must be assumed that the jury credited the People's witnesses and gave the People's evidence 'the full weight that might reasonably be accorded it' (*People v Benzinger*, [*supra* at 32; other citations omitted])."

The two circumstances, i.e., (1) that the police never recovered the victim's body and (2) that no one other than the victim and her killer personally witnessed the violent act which ***132** ended her life, do not bar a valid murder conviction under current law. That was not always the case. Thus, under *Ruloff v People* (18 NY 179), those two facts once precluded a murder prosecution in New York. In that 1858 case, the Court of Appeals held, "without direct proof of the death, or of the violence or other act of the defendant which is alleged to have produced death," a murder conviction may not stand (*id.* at 184).

However, in 1982, in *People v Lipsky* (57 NY2d 560), the Court of Appeals overruled *Ruloff*.Indeed, the *Lipsky* Court expressed "no hesitancy" in holding that "the corpus delicti may be established by circumstantial evidence" (*id.* at 569). The clear and direct language the *Lipsky* Court selected to disavow the 124-year-old *Ruloff* ruling is significant in light of the *Ruloff* facts, because those facts are, in several key ways, similar to those at bar. No murder weapon was ever found in either case, neither defendant confessed, neither murder was witnessed, and neither victim's body-- or any remains--was ever found.

As defendant now also argues that the verdict is against the weight of the evidence, this Court, in its unique factual reviewing role, must also determine whether, "based on all the credible evidence, a different finding would not have been unreasonable" (*People v Bleakley*, 69 NY2d 490, 495). Should we answer that inquiry in the affirmative, we next "must ... 'weigh the relative probative force of conflicting testimony and the relative strength of conflicting

inferences that may be drawn from the testimony' (*People ex rel. MacCracken v Miller*, 291 NY 55, 62 [other citations omitted]). If it appears that the trier of fact has failed to give the evidence the weight it should be accorded, then the appellate court may set aside the verdict (CPL 470.20 [2])." (*Id.*)

Applying these principles to the evidence in this purely circumstantial murder case, our review convinces us that, notwithstanding the facial attractiveness of some of the factual arguments defendant's appellate counsel presents, this guilty verdict, based on the proof this jury heard and saw, is the only fair and reasonable outcome (*see People v Sanchez*, 61 NY2d 1022, 1024).

That is not to say that some of the many items of incriminating evidence, when each is evaluated in isolation, are not susceptible to arguable inferences which at first blush seem consistent with defendant's claim of innocence. But, when one attentively reviews and critically assesses all the circumstantial evidence, cast in its aggregated and interwoven symmetry, andafter*133 applying all natural and reasonable inferences, the conclusion that defendant murdered his wife on July 7, 1985 becomes inescapable, and the evidence excludes beyond a reasonable doubt any reasonable hypothesis of innocence.

This abundant array of damning circumstantial evidence proves beyond any reasonable doubt that defendant intentionally killed this victim; that he did it on the date, at the time and for the reason the People offered; and that he disposed of her body as the People contend. When one applies the appropriate legal principles, these conclusions become most

compelling for a rational, dispassionate and attentive factfinder.

To begin with, any notion that the victim disappeared in some way other than her actual demise on July 7, 1985 is utterly dispelled by a combination of the legitimate inferences raised by all the proof and by defendant's concession that his wife died, and that she died that day. There is every reason in this record to find that defendant was the last person to see her alive at 11:00 A.M. that Sunday morning. Apart from the fact that there is no reliable evidence that anyone else saw or heard from her thereafter, defendant repeatedly admitted to several people, including his father, that he last saw her then. In fact, defendant even misstated to Detective O'Malley that the building doorman said he last saw her leave the building shortly after 11 o'clock on July 7. Defendant later retracted that claim.

Second, he admitted that their marriage was unhappy and virtually over, and that his own anger had reached a level tempting him toward violence against her because he was so frustrated by the strife between them. Moreover, he told Dr. Feis--after withholding the whole truth from others, and from her during their many earlier conversations subsequent to July 7--that his last encounter with his wife on July 7 ended in an argument more "severe" than he had previously let on, that it "had become explosive," and that in its midst he had failed to heed his psychiatrist's advice to "defuse the situation." More specifically, he also admitted to his father that they had "difficulty in adjusting to each other," and in 1983 " [t]hat they had an argument, had some physical contact." By way of corroboration, Dr. Leigh

McCullough testified that in November 1983 she saw "finger shaped" bruises on the victim's neck, and the latter told her that defendant choked her when he became angry at seeing her smoking a cigarette.

By 1985, the parties' three-year-old marriage can fittingly be described as an emotional battleground. Verbal strife plagued *134 it, express and implied threats uttered by defendant aggravated it, and defendant's admitted violence against his victim during at least one episode surely worsened it. By July, it was against this backdrop that a divorce was virtually inevitable--a situation exacerbated further by defendant's knowledge of his wife's adultery.

Armed with circled apartment rental ads the day before she disappeared, the victim declared to her close friend, Denise Kasenbaum, that she was leaving defendant that weekend. The evidence is also strong that she was determined to confront defendant with her divorce demands. Her stated intentions, should defendant refuse to accede to those demands, were plain. First, she would threaten to humiliate him by publishing to his professional colleagues and superiors a warning letter she had received from defendant's treating psychiatrist; and, second, she would threaten to expose an alleged Medicare fraud in which she claimed he and his father were allegedly involved. As discussed at greater length elsewhere in this opinion, notwithstanding defendant's contentions to the contrary, this evidence is clearly relevant not only to motive, but to intent and identity.

That the victim had once before confronted him with the same letter and her same threat weeks or months before July 7 does not, as defendant now urges,

diminish the potential explosiveness of her intended confrontation on the weekend she died, because the testimony is otherwise clear and certain that she once again intended to tell defendant over that weekend that she was divorcing him. To reject any notion that the victim intended to use the letter a second time simply because she may have already used it once before would unreasonably ignore her various statements, her reasons for wanting a divorce, and her state of mind as that fateful weekend approached.

While no one other than the victim and defendant was present to observe what transpired in the marital dwelling on the morning of July 7, the inference from the foregoing circumstantial facts is most compelling, if not irresistible, that they had a hostile confrontation that weekend about the future of their marriage, its serious problems, and how each would deal with them. No other inference finds any support in this record, and none could survive an impartial and objective assessment of the proof, particularly in light of defendant's admission that their argument was "severe" and "had become explosive."

These facts establish beyond any question that this marriage existed in a volatile, highly emotional, turbulent and dysfunctional *135 environment. This couple had a history of angry words and deeds, of threats, and of violence; they harbored a wide range of feelings ranging from ambivalence to profound hostility toward each other, and, beyond their generalized resentment, defendant had evident motives to kill the decedent. Surely, killing her would not only end their miserable and loveless marriage, and end it without the expenses and financial burdens of divorce, but it would also stop her from carrying out

her threats to expose his violence and his alleged fraud. Exposing these transgressions, if it did not disgrace him, would most certainly compromise his professional standing, damage his personal reputation, and injure his short- and long-term career plans and income potential.

Moreover, his behavior with other women so soon after July 7 is inconsistent with behavior one would reasonably anticipate from a husband whose wife had mysteriously disappeared, notwithstanding that their marriage was stormy. Indeed, his behavior utterly belies his claims of ignorance of his victim's whereabouts. This conclusion is effortlessly drawn not nearly so much because he began dating so soon, but much more because of his obvious and expressed confidence his wife would never return.

After all, he made several statements making it appear he had no idea how his wife disappeared, where she was, and when or whether she would ever return. Contemporaneously with these expressions of despair and bewilderment, he promptly had sexual relations on his first date with a nurse in the very room he and his victim had rented for the 1985 summer in the Hamptons, less than a month after she "vanished." One can reasonably infer that he knew she would not suddenly return and appear at his bedside.

Furthermore, he invited a different woman to move into the marital apartment with him in September 1985. When a few months later he received an early morning telephone call from the police indicating they may have had his lost wife at the precinct, he was less than anxious to accede to their request that he

immediately leave his bed to possibly identify his "inexplicably missing" wife. At that point and with no expressed hesitation or apparent lack of confidence, he told his paramour to remain in bed through the night in the marital apartment, because he "doubt [ed]" it was his wife. This aspect of the evidence, when viewed with all else the People proved, compels inferences that defendant had an informed reason, based on his own direct knowledge, to be completely unconcerned ***136** that: (a) his paramour might shortly be forced to confront his "missing wife" in her own bedroom; and (b) his early morning trip to the precinct would reunite him with her.

In addition to the foregoing powerful circumstantial evidence, the People contend that the interplay between certain items of evidence also supports the verdict. They argue that when certain established facts are juxtaposed with other proven circumstances, defendant's multiple contradictions and omissions are patently incriminating. Therefore, in the aggregate, the People convincingly advance the conclusion that the jury's verdict was correct. Illustrative--but not exhaustive--are the following examples:

1. Defendant misstated that the doorman told him he saw the victim on the afternoon of July 7, when in fact the doorman made it clear he saw her last on July 6 and he could not remember whether he saw either the victim or defendant at all on July 7;

2. Defendant described differently to different people the items the victim took and the clothes she wore when she purportedly left to sunbathe in Central Park, and whether she was then wearing shoes and her engagement ring;

3. Defendant gave contradictory accounts about whether and why he sent the living room rug out to be cleaned immediately following the decedent's disappearance, but completely withheld that information from the police;

4. He was inconsistent about his purported knowledge of his wife's post-July 7 whereabouts, alluding to different theories and purported sightings to different people. Defendant variously suggested or stated that his wife was wandering around Central Park in "a fugue state," that she had a drug problem and ran off with drug dealers, that she possibly committed suicide, that she was on a shopping spree at Bloomingdale's, that she left to hang out with "druggie friends," that she might have been killed by drug dealers, and that she had left for the Carribean to be with a boyfriend. In one instance he falsely claimed that a private detective, whom he also claimed he hired to find her, learned she was living in California with financial support from her family. Not a single shred of evidence in this record supports any of these bizarre claims;

5. Perhaps defendant's most damning omission was his repeated, false claim to the police and to others that he remained in the apartment all afternoon on July 7 and then went directly to his nephew's birthday party in New Jersey. *137 However, the evidence also conclusively establishes that he rented and flew a Cessna 172 airplane beginning at 4:30 P.M. that day from Caldwell Airport in Fairfield, New Jersey and returned two hours later at 6:30 P.M. He can hardly claim with any credibility that an interlude of that nature and length slipped his mind

when he spoke to the police and others on the first day, or, indeed, at least four times during the first week, following his wife's "unexplained" disappearance.

Compounding the significance of that devastating omission--an omission which concealed the very means and opportunity to dispose permanently of his victim's body--is the documentary evidence found in his home several months after July 1985 showing clearly that his written flight log entry for July 7 was changed from July 7 to August 7.

Furthermore, he said to at least two people, not including the police, that he had searched for his inexplicably missing wife in Central Park on the afternoon of July 7 and there allegedly found the suntan oil and towel she had taken with her when she left the apartment at 11:00 A.M.

However, notwithstanding that, initially, the police carefully explained to him at least three times their critical need to know every detail he was able to recall in order to aid their search efforts, he withheld all of this information during their interviews with him--one encounter a mere 34 hours, and the others all within seven days--following his wife's disappearance. It is beyond cavil that this information was relevant and that it was exactly the type they implored him to convey. Instead, he consistently told the police and others that he remained in the marital apartment from the time the victim had left at 11:00 A.M. until 5:30 P.M., then going directly to his nephew's birthday party at his sister's New Jersey home;

6. During the first police interview of defendant on

July 8 at 9:00 P.M., lasting 45 minutes, Detective Dalsass asked defendant for a list of the names and phone numbers of the victim's friends, relatives and others to facilitate the search efforts. Because defendant did not have a list with him, Dalsass said he would call defendant's home for it that evening. However, defendant said he would not be home until later, as he had plans to dine out--after an interview which had focused on his wife's sudden "disappearance" just 34 hours earlier. Dalsass waited until 12:30 A.M. and left the first of approximately eight messages on defendant's home answering machine and at his work number during the ensuing week. Defendant responded to none of them. Consequently, although defendant had contact *138 with Detective O'Malley in the interim, Detective Dalsass could not speak to defendant to obtain that vital information until the July 14 interview. Furthermore, he did not turn over the victim's telephone/address book until more than two weeks after her disappearance;

7. He told several people that, just before his wife left the apartment for the last time, they argued. Nevertheless, he contradicted himself among various versions and aspects of those statements. Furthermore, when defendant spoke to Detective Dalsass on Monday, July 8 and again on Sunday, July 14, he never said--indeed on July 8 he denied--that he and his wife argued that morning, even though Dalsass did acknowledge that defendant, on July 14, said the victim was "pissed" the morning she left. However, apparently also on July 8, defendant told the victim's therapist, Dr. Sybil Baran, that he and the victim had argued and that "she'd gone off in a huff";

8. Although defendant would not allow any police officers to view or inspect his apartment until September 30, 1985--and then only with severe restrictions--he, long before that day, falsely stated to others that the police had searched his home and car and found him to "be clean"; and

9. Defendant falsely attributed to Dr. Baran the opinion that the victim was depressed and might have committed suicide. Dr. Baran unequivocally denied she had ever made either of those statements to defendant or that she had even held these opinions. In fact, several witnesses, including Dr. Baran, described the victim's state of mind during the period before July 7 as being "happy," "jovial" and the like.

Defendant's lies, misstatements and omissions powerfully bespeak his consciousness of guilt. We recognize that the law most often views consciousness of guilt evidence as weak--but not always. The Court of Appeals has made that clear. In *People v Cintron* (95 NY2d 329, 333), the Court said that the "probative weight" of evidence of consciousness of guilt is "highly dependent upon the facts of each particular case." In an earlier case, specifically referring to a defendant's false statements, the Court said:

"In the circumstances of this case, it is difficult to come to any other conclusion than that these false statements indicate a consciousness of guilt. We recognize that as a general proposition false statements are a relevant but weak form of evidence. ***139** (See, e.g., *People v. Leyra*, 1 NY2d 199.)Since there may be reasons other than guilt of the crime charged which would prompt a person to give a false

statement, the probative weight of such statements depends upon the facts of the particular case. On the facts here, *it is reasonable to assign a moderate degree of probative force to the false statements.*" (*People v Benzinger*, 36 NY2d 29, 33-34 [emphasis added].)

In considering whether this defendant's behavior and statements show evidence of his consciousness of guilt, we find that they unquestionably do. And, while we agree this type of evidence, alone, may not and should not form the basis for a finding of guilt, it may be taken into account in evaluating all the other evidence. We further determine that the instant body of consciousness of guilt evidence--because of its quality and quantity--exhibits a guilty mind, a finding which, in this context and under these circumstances, is surely not weak, or, for that matter, even moderate. Rather, the evidence is credible and we hold that the resulting inference is strong.

Of course, if one were to evaluate each item of evidence in isolation, a different conclusion might be reached for at least some sequestered items. But, as the law requires us to look at the body of proof as a whole, we are convinced it paints a clear picture of defendant's guilt, and that the jury's verdict is both supported by legally sufficient evidence and entirely consistent with its weight.

The People proved beyond a reasonable doubt that this defendant had the opportunity, the motive, and the intent to kill his victim, and that it was he who did so. Beyond that, the proof also clearly shows how he went about it, that she did not kill herself, nor that any boyfriend or drug dealer killed her.

Apart from the fact that defendant's alternate theories of his victim's demise have no evidentiary support, the existing evidence itself also refutes them. Her body was never found and the great weight of the evidence shows that she was anything but desperate or depressed so that one might reasonably fear she was contemplating suicide. That was the overwhelming opinion of those closest to her, including her gynecologist, her therapist of three years, and her sister, three confidantes in the best position to know. Moreover, it is unlikely that one's body would vanish without a trace in the aftermath of self-inflicted death.

As for any suggested theory that someone other than defendant killed her, no proof exists in this record which is even ***140** remotely consistent with such speculation, and there is no one other than defendant Bierenbaum who, like he, had the motive or had the exclusive opportunity to kill her at the time and place where the victim was last seen alive; and, surely, there was no one who signaled his obvious guilt by covering and distorting the truth as this defendant repeatedly did. His claim of innocence--and the presumption which accompanies it--has been utterly overwhelmed and destroyed by the People's proof.

In our sufficiency review, we have determined that a "valid line of reasoning and permissible inferences could lead a rational person to the conclusion reached by [this jury] on the basis of the evidence at trial, viewed in the light most favorable to the People ..." (*People v Williams*, 84 NY2d 925, 926). Furthermore, there is virtually no conflicting testimony within the People's case to compare against the weight of the People's credible proof, proof which so firmly supports

this conviction. Moreover, the testimony of the only defense witness, Joel Davis, suggesting that he saw the deceased on the afternoon of July 7, was extremely weak. It was appropriately rejected by the jury. Accordingly, there can be no holding that this verdict is against the weight of the evidence.

It is clear to us that a finding other than guilt would not have been reasonable. We also conclude that even if a different finding were somehow deemed reasonable, there can be no rational view after "'weigh [ing] the relative probative force of conflicting testimony and the relative strength of conflicting inferences that may be drawn from the testimony' (*People ex rel. MacCracken v Miller*, 291 NY 55, 62 [other citations omitted])," that this jury "failed to give the evidence the weight it should be accorded" (*People v Bleakley*, 69 NY2d 490, 495).

In light of the foregoing, this verdict is supported by legally sufficient evidence and it is thoroughly consistent with the evidentiary weight.

2. *Psychiatrist's Warning Letter and Other Hearsay*

(2) The Trial Justice rejected the People's pretrial request to call defendant's treating psychiatrists and psychologist as witnesses to testify about factual matters and opinions connected to their treatment of defendant, including the conversations they had with the victim and defendant's parents, after defendant's consent was procured. The court did, however, permit the prosecution to adduce testimony that the victim had received a letter from one of these psychiatrists warning her of the danger defendant posed to her, although the Justice prohibited the People from

introducing the letter itself. *141 Notwithstanding that defendant originally consented to having the psychiatrist speak to and warn the victim and his parents, he now claims that the ruling allowing testimony only about the existence and nature of the warning letter was error because it violated his statutory privilege under CPLR 4504 (a) and it was otherwise unduly prejudicial. We disagree.

The psychiatrist communicated the consented-to warning by sending a letter, sometimes referred to as a *Tarasoff* letter (*see* *Tarasoff v Regents of Univ. of Cal.*, 17 Cal 3d 425, 131 Cal Rptr 14), to the victim. The Justice allowed the jury to learn only of its existence and nature, but not of its specific contents beyond its warning to the victim that defendant posed a threat to her. That ruling was correct, first, because defendant waived his CPLR 4504 (a) privilege by consenting that the warning be communicated; second, because a warning under these circumstances is an exception to the principle of confidentiality since the psychiatrist is under a duty to warn the intended target of a patient's violence; third, because the nature and existence of the warning letter were relevant to the state of the parties' marriage and defendant's motive to kill his wife in light of her stated intent to use it as leverage in her contemplated divorce action against defendant by confronting him with it and threatening to reveal its contents if he refused to meet her divorce settlement demands; and, finally, because it was relevant to prove, in addition to motive and the state of the parties' marriage, the interrelated issues of his intent to kill her and his identity as her killer.

CPLR 4504 (a) in part provides:

"Confidential information privileged. *Unless the patient waives the privilege,* a person authorized to practice medicine ... shall not be allowed to disclose any information which he acquired in attending a patient in a professional capacity, and which was necessary to enable him to act in that capacity" (emphasis added).

Because defendant consented to having the warnings and disclosures communicated, not only to the victim but also to his parents, the court's ruling about the warning letter was correct. As this Court stated in *Matter of Farrow v Allen* (194 AD2d 40), once a patient authorizes his or her psychiatrist to release what might otherwise be a privileged letter to "a third party who is completely unconnected to his or her treatment and who is not subject to any privilege," its release "is sufficient to waive the privilege as to the information contained in *142 the letter itself" (*id.* at 44;*cf. Doheny v Lacy*, 168 NY 213, 223-224;*Workman v Boylan Buick*, 36 AD2d 978, 979;*In re von Bulow*, 828 F2d 94, 100-101). Since none of the three of these relatives was involved in providing defendant treatment nor subject to any other privilege (*see Poppe v Poppe*, 3 NY2d 312 [marital privilege inapplicable where one spouse wrongs another]; *People v Davis*, 226 AD2d 125, 126,*lv denied*88 NY2d 1020 [quoting *Poppe*]; *People v Govan*, 268 AD2d 689,*lv denied*94 NY2d 920 [crime against spouse extinguishes statutory privilege]; *People v Johnson*, 84 NY2d 956 [no statutory or common-law parent/child privilege for adult child under these circumstances]), the court correctly decided that defendant waived the privilege. Furthermore, the Trial Justice gave the People even less leeway than

Farrow permits after a waiver, by ruling that only the existence and nature of the letter--not its factual content nor the physicians' testimony--were admissible.

Therefore, the Trial Justice's ruling was a careful and completely reasonable exercise of judicial discretion.

Moreover, the ruling was correct also because of the *Tarasoff* exception to the CPLR 4504 (a) privilege. That exception provides that for compelling policy reasons the privilege can be overcome when the patient demonstrates that he poses a clear and present danger to a third party--in this case his wife. In *MacDonald v Clinger* (84 AD2d 482, 487), the Court said:

"where a patient may be a danger to himself or others (see, e.g., *Tarasoff v Regents of Univ. of Cal.*, 17 Cal 3d 425;*Berry v Moench*, 8 Utah 2d 191;*Simonsen v Swenson*, 104 Neb 224), a physician is required to disclose to the extent necessary to protect a threatened interest. 'The protective privilege ends where the public peril begins' (*Tarasoff v Regents of Univ. of Cal., supra,* at p 442)."

Defendant also relies on the Trial Justice's rejection of the People's request to call defendant's three treating doctors to testify at trial. He thus argues that her ruling necessarily extends to preclude the People from also proving the existence and nature of the *Tarasoff* letter. However, the Trial Justice specifically stated her ruling did not apply to preclude the letter's existence and nature.

Additionally, her key reason for precluding the

professionals from giving oral testimony at trial was that one of their purposes for consulting with defendant's closest family members was to gain insights from his family members, *143 insights which might enhance their treatment of defendant. That logic, which correctly served to preclude the doctors from testifying to the information they conveyed to and received from the family, does not apply to the existence and nature of the psychiatrist's letter whose *separate* purpose was *only* to warn a third party, this victim.

Because the letter's *separate* purpose was to warn, and, further, to insure that its disclosure at trial for that valid purpose did not publish its otherwise confidential contents--and thus breach the court's associated preclusion order--the court appropriately placed significant restrictions on the People's use of the letter. First, the court prohibited the People from showing the letter to the jury and, second, they were not permitted to adduce anything other than oral testimony describing only the type of letter the victim had received from defendant's psychiatrist.

Defendant next argues that the claimed relevancy of the *Tarasoff* letter does not justify its introduction because its prejudicial effect outweighs its probative value. He urges now--as he did at trial--that the court could have served the People's purpose adequately by only allowing the People to use the letter to inform the jury that the letter existed, and stipulating that its unspecified contents would embarrass defendant. However, the court, while prohibiting publication of its specific factual contents to the jury, did allow the jury to know that the letter warned the victim of the danger defendant posed to her. Notwithstanding

defendant's argument, this limitation was, under these circumstances, an exercise of discretion which was fair to both sides for the following important reason.

One of the prosecution's key assertions was that defendant was motivated to kill his wife because she threatened to destroy him by exposing the letter's contents should he fail to meet her divorce demands. It was therefore highly relevant to the question of defendant's motive that the jury be allowed to know and consider the consequences the victim intended by threatening defendant with such a disclosure to his superiors and peers, a disclosure which would likely compromise severely his professional status, his personal reputation and standing, and his economic future. While defendant understandably argues that this ruling prejudiced him at trial, we hold that under these circumstances it did not unduly do so. It is clear to us that the highly probative nature of this particular proof on the critical questions of defendant's motive and intent, and of the killer's identity, far outweighs any prejudice (*see* *144*People v Alvino*, 71 NY2d 233, 241-242). Indeed, this prosecution contention--i.e., that it helped expose defendant's motives--was a valid one, as it is at the heart of the People's case.

We note further that the court exercised its discretion appropriately by rulings which significantly and thoughtfully limited the People. The Trial Justice's carefully balanced decisions allowed the People to show only the existence and the general nature of the letter in order legitimately to probe defendant's motive. On the other hand, by concomitantly excluding the letter itself, suppressing its factual

content and prohibiting the proffered testimony of defendant's three treating mental health professionals whom the People had intended to call as witnesses, these rulings protected the remaining, essential aspects of defendant's statutory privilege under CPLR 4504 (a).

Finally, the court's cautionary instructions to the jury were more than adequate to assure a relevant and fair consideration of this evidence and avoid prejudicial impact.

(3) Turning next to defendant's hearsay claims, he argues that the Trial Justice erroneously allowed several People's witnesses to testify that the victim had told them that, inter alia, her marriage was stormy, that she was afraid of defendant, that he was very controlling, that there was much verbal strife between them, that her husband had occasionally made threatening statements to her, that he once choked her in 1983 rendering her unconscious, that she had taken steps to prepare to leave him, and that she had used and intended again to use the *Tarasoff* letter to threaten him if he failed to meet her divorce demands.

To begin with, the court, on a number of occasions during trial and at its conclusion, gave the jury cautionary instructions about the victim's statements and other related evidence, evidence the People had introduced to explain two critical factors, i.e., the state of this marriage and both parties' state of mind. This Court has reviewed these various instructions given during trial and at its end. We disagree with defendant and find them fair and legally satisfactory.

Defendant also disputes the instructions' adequacy, and, beyond that--in addition to urging this Court to reject the notion of a background exception to the hearsay rule--he further argues that the testimony recounting the victim's out-of-court statements was largely unreliable. He therefore contends it was inadmissible under *Nucci v Proper* (95 NY2d 597) even if it were deemed otherwise allowable. We disagree.*145

We hold that the reliability of this evidence, initially a question for the court to resolve, is amply supported by this record. In *Nucci*, the Court set forth the factors relevant to a trial justice's assessment of the reliability of out-of-court-statements which the People proffer as hearsay exceptions. The Court said (at 603):

"Reliability is the sum of the circumstances surrounding the making of the statement that render the declarant worthy of belief. Relevant factors include 'spontaneity, repetition, the mental state of the declarant, absence of motive to fabricate, ... unlikelihood of faulty recollection and the degree to which the statement was against the declarant's ... interest' (*see People v James*, 93 NY2d 620, 642 [citing *Idaho v Wright*, 497 US 805, 821;*Dutton v Evans*, 400 US 74, 89]). Courts have also 'considered the status or relationship to the declarant of the person to whom the statement was made ..., whether there was a coercive atmosphere, whether it was made in response to questioning and whether the statements reflect an attempt to shift blame or curry favor' (*James, supra*, 93 NY2d, at 642-643 [citing *United States v Matthews*, 20 F3d 538, 546, other citations omitted])."

The victim's contested statements meet virtually all

these enumerated criteria. She was speaking spontaneously; she repeated the statements separately to various people in her life; her statements about the troubled side of their marriage were a natural consequence of corroborated facts about their marriage; she was, by all indications, in good mental health; there appears no reason for her to have fabricated the matters she discussed at the time of her utterances; and her statements largely concerned private matters that some would be embarrassed or otherwise reluctant to disclose. Furthermore, the statements were made mostly to those close to her, in contexts completely devoid of coercion, not in response to anyone's questioning, nor under circumstances at all suggestive of any attempt to curry anyone's favor.

As for defendant's remaining reliability claims, they raise questions quite properly within the jury's province. The proof more than adequately supports the jury's determinations.

Defendant also argues that although this contested hearsay information, emanating from the victim, was admitted purportedly as legitimate background evidence, there is no "background *146 exception" to the hearsay rule, and, beyond that, this "background information" was highly prejudicial, and, therefore, the Trial Justice should have precluded it. We hold otherwise.

Most of the victim's hearsay statements, in one way or another, bespoke this couple's marital strife and unhappiness, a perception defendant himself shared and repeatedly admitted. In a domestic violence homicide, as this clearly is, it is highly probative--

quite often far outweighing any prejudice--that a couple's marriage was strife-ridden and that defendant previously struck and/or threatened the spouse-victim (*see* *People v LaFrance*, 182 AD2d 598, 599-600, *lv denied* 80 NY2d 905; *People v Shorey*, 172 AD2d 634, *lv denied* 78 NY2d 974). Indeed, it has also been held that such evidence in like contexts is "highly probative of the defendant's motive and [is] either directly related to or 'inextricably interwoven' (*People v Ely*, [68 NY2d 520], 529) with the issue of his identity as the killer" (*People v Linton*, 166 AD2d 670, 671, *lv denied* 77 NY2d 879; *see also* *People v Laverpool*, 267 AD2d 93, *lv denied* 94 NY2d 904; *People v Bonilla*, 251 AD2d 82, *lv denied* 92 NY2d 893).

Defendant asserts that because there is evidence of "only one" earlier act of violence by him against his wife, this murder case should not be considered as a "domestic violence homicide," and therefore there is no justification for the single alleged choking episode to be received in evidence along with various threats and other evidence of discord. In part, he frames his argument by citing reported "domestic violence" cases wherein the jury was allowed to learn that the victimized spouses endured more than one attack by the accused predating the violent act charged in the indictment. He thus claims that those cases do not apply to permit such evidence under these facts because this case involves evidence of only one prior assault.

We reject the notion that in a case where an alleged homicide is the second alleged violent act against a spouse--instead of, for example, the third, fourth or ninth--the case may not be treated as a "domestic violence" homicide for purposes of evidentiary rulings.

Whether earlier acts of alleged violence or threats are admissible depends on the circumstances surrounding both the past and the currently charged aggressive acts or threats. A trial court must not merely count the number of past incidents, but it must engage in a qualitative assessment of the words and deeds which create the history of the relationship between defendant and alleged victim. It is on the basis of ***147** that history and its relevance to proving an element of the crime charged--and, as well, after the court balances probative value against potential prejudice--that a court may determine the admissibility of prior evidence of aggressiveness, be it acts of domestic violence, threats or otherwise. Encouraging that type of qualitative analysis is the common theme of this state's settled law on this subject (*see* People v Pena, 251 AD2d 66,*affd*93 NY2d 946 [prior assault admissible]; *People v Jones*, 289 AD2d 1010,*lv denied*97 NY2d 756 [prior threats of violence and acts admissible]; *People v Lee*, 284 AD2d 412,*lv denied*96 NY2d 921 [previous assault against victim admissible]; *People v Reynoso*, 262 AD2d 102,*lv denied*93 NY2d 1025 [prior assault admissible]; *People v Steinberg*, 170 AD2d 50,*affd*79 NY2d 673 [uncharged evidence of prior assaultive acts may be admissible as background to support testimony that otherwise might be unbelievable or suspect]).

Surely, one can argue as defendant does that any single aggressive act or threat, or a series of them, can suggest to a jury a general propensity to behave aggressively. On the other hand, the acts and/or threats can--separately or together--demonstrate as they do in the instant case defendant's specific intent to hurt a particular human being, i.e., in this case, his wife, and to do so physically and emotionally. They

also manifest his motives to abuse and control her, to quickly end a miserable marriage, and ultimately to keep her from using the *Tarasoff* letter in a divorce proceeding to humiliate him, damage his reputation, imperil his career and jeopardize his financial future.

After reviewing the court's rulings and reasons in this regard, the other evidence, and the court's cautionary instructions to the jury during and at the trial's conclusion, we hold that none of these rulings compromised defendant's right to a fair trial.

3. *Excited Utterances and Prior Violence*

(4) Defendant contends that the court improperly allowed the prosecution to adduce testimony, and otherwise refer to evidence, that defendant was violent, and that he choked his wife to the point of unconsciousness in late 1983. As a part of that contention, defendant also asserts that the Trial Justice erred in allowing Hillard Wiese, an attorney and the victim's cousin, to testify about the victim's purported "excited utterances" describing the choking event. The victim, whom Wiese occasionally saw at family gatherings, telephoned him at his office one afternoon in the fall of 1983. She was seeking his *148 advice. "[S]peaking in very hushed tones and very rapidly ..." and "sound[ing] extremely upset," she said that "either the day before or the night before she had a fight with her husband and that during the course of that fight he had choked her into unconsciousness ...." According to Wiese, she added "that this was not the first time that they had fought" nor "the first time he had choked her, but it was the first time she was rendered unconscious and that she was extremely upset." She apparently spoke quickly because she

expected defendant to return shortly, and she needed to know what she should do.

Defendant correctly argues that the victim's statements during her telephone call to Hillard Wiese do not constitute "excited utterances." As the Court of Appeals recently wrote in *People v Vasquez* (88 NY2d 561, 579):

"An excited utterance is one made 'under the immediate and uncontrolled domination of the senses, and during the brief period when consideration of self-interest could not have beenbrought fully to bear by reasoned reflection' (*People v Brown*, ... 70 NY2d [513] at 518). The existence of a physical shock or trauma has often been cited as a key consideration (*see, People v Brooks*, 71 NY2d 877;*People v Brown*, 70 NY2d, at 516-517; 6 Wigmore, Evidence § 1745 [1] [Chadbourn rev ed]). While the statement must have been made before the declarant had the opportunity to reflect, "'the time for reflection is not measured in minutes or seconds,"' but rather "'is measured by facts."' (*People v Marks*, 6 NY2d 67, 72,*cert denied*362 US 912;*People v Norton*, 164 AD2d 343, 353,*affd*79 NY2d 808.)The court must assess 'not only the nature of the startling event and the amount of time which has elapsed between the occurrence and the statement, but also the activities of the declarant in the interim' (*People v Edwards*, 47 NY2d 493, 497 ...)."

To begin with, Wiese was unable to reliably estimate how long before his cousin called him that the choking incident occurred. Based on what he said at trial, the interval could have been as long as 24 hours, hardly a typical time span to qualify as an "excited utterance." Second, the record is totally devoid of evidence about

what transpired during these many intervening hours to enable the trier of fact to determine, based on "'the activities of the declarant in the interim,"' whether the "declarant had the opportunity to reflect ..." (*id.*). Finally, the victim chose to call an attorney, rather than a ***149** layperson, one with whom she did not have an especially close, personal and confidential relationship.

Consequently, it is not improbable that her call followed at least some degree of reasoned reflection. Thus, it is impossible for a court to conclude safely that her motivation was untouched by economic self-interest or unencumbered by concerns about legal strategy. Finally, although the alleged assault she recounted was undoubtedly extremely frightening, the proof shows her mental state so many hours later was not shown to be dominated by the same level of heightened excitement that would normally overwhelm a person in the *immediate* aftermath of such a recent traumatic shock.

Therefore, the Trial Justice should not have admitted the victim's statements to Hillard Wiese as "excited utterances." However, we hold that this error was harmless, because, as we noted earlier, the jury otherwise properly learned that the victim claimed defendant had committed a violent act against her in the fall of 1983, as evidence relevant to the state of their marriage, to defendant's motive, to his intent, and relevant evidence of identity. Indeed, defendant himself told his father in 1983 that their strife had reached the point of "some physical contact," and there is credible testimony that in 1985 defendant was so filled with hostility that he was tempted toward violence against his wife. Therefore, even

though the victim's phone conversation with Wiese was erroneously admitted as "excited utterances," its core content was nonetheless relevant, admissible, and the jury properly heard about it from other witnesses.

Defendant counters this reasoning, contending that the 1983 choking incident and all the other evidence and references to threats and marital strife should have been precluded because they bespeak propensity and because the People improperly used the choking incident to suggest that defendant had a propensity for violence. Therefore, he argues such evidence unduly prejudiced him, outweighing any of its probative value.

This complaint--apart from ignoring or underestimating the appropriate, limiting language the court carefully chose to caution and instruct the jury-- misconstrues the rationale underlying *People v Molineux* (168 NY 264) and its progeny. *Molineux* authorizes a trial justice to consider allowing a jury to hear about a defendant's prior bad acts--be they violent or otherwise--if they shed light on the issues of intent, identity, motive, absence of accident or mistake, or common plan and scheme (*id.* at 293). In other words, they "may be admitted *150 only if the acts help establish some element of the crime under consideration ..." (*People v Lewis*, 69 NY2d 321, 325). In this case his behavior and threats were admitted because they revealed the former three of these five potentially relevant items.

Often, evidence of prior assaults and threats manifests general aggressiveness, i.e., a general propensity to act aggressively against other people. It

is this inappropriate and distracting inference which the *Molineux* ruling and its progeny aim to bar. However, the proof here evinces defendant's intent to focus his aggression on one person, namely, his wife--his victim. That key factor in the context of marital or other intimate relationships frequently differentiates domestic violence assaults and homicides--wherein prior bad acts have often been deemed admissible during the People's direct case--from other cases wherein evidence of past assaultive behavior against people other than the victim has most properly been precluded. In the former, the previous aggression principally indicates intent, or motive, or identity; whereas in the latter it can predominantly give rise to an inference of propensity. This logic and rationale accords with well-settled law in New York in these matters (*People v Angel*, 238 AD2d 210,*lv denied*90 NY2d 1009;*People v Bonilla, supra; People v LaFrance, supra*).

Finally, this evidence shows that this defendant was motivated and had an intent to harm this victim. There is little or nothing by way of circumstantial evidence that is more relevant or more probative in a circumstantial murder case--especially one involving domestic violence--than the type of evidence at issue on this appeal.

We also reject defendant's claims in their entirety that the prosecutor's summation exacerbated the error which he says occurred by dint of the court's decision to admit evidence of the 1983 choking incident; and that the court's charge did not, nor could it, adequately safeguard defendant's right to a fair trial. First, the court correctly ruled that defendant's objection in the form of a mistrial motion, after

summations were completely over, was belated (*see* *People v Allende*, 269 AD2d 211, *lv denied* 95 NY2d 792; *People v Valez*, 256 AD2d 135, *lv denied* 93 NY2d 879), and its denial of the motion was a discretionary decision we perceive no reason to disturb. Second, if we were to reach the merits, we would find that the prosecutor's summation arguments on the subject, when viewed in the complete context of his closing statements, do not warrant reversal. Furthermore, when they are read together with the court's cautionary ***151** charges wherein the Trial Justice repeated and emphasized the limited value of this and other related evidence, we firmly believe the record belies his contention that he was denied a fair trial.

4. *Medical Examiner's Testimony and Videotaped Demonstration*

Defendant contends: (1) that the Trial Justice improperly allowed the People to adduce opinion testimony that he was able, as a trained surgical resident, to dismember the victim's body within 10 minutes, and also capable of packing it into a flight bag, whether or not the body had been disarticulated; and (2) that the court improperly permitted the jury to watch a videotaped demonstration depicting how a pilot can, without any assistance, load a 110-pound body, so packaged, onto a Cessna 172 airplane, fly it over the ocean, and discard it overboard.

The defense argues that these rulings were improper because: (1) there was no evidentiary foundation to justify the opinion evidence and the scenario depicted in the video demonstration, i.e., that they were purportedly based on speculation; and (2) these forms of evidence are extremely potent, inflammatory, and

therefore they unduly prejudiced defendant in a case like this where, according to him, there is no proof to support the opinions or the scenario shown on tape. We disagree.

As for the opinion testimony, the court exercised its discretion properly by admitting the medical examiner's expert testimony. Those opinions, contrary to defendant's argument, did not endanger the jury's objectivity, as the record in no way suggests that they were delivered in anything other than a dispassionate and brief manner. In addition, they sufficiently related to the circumstantial evidence the People offered, thus enabling the jury to understand medical and surgical matters beyond their ken and better evaluate the prosecution's theory (*People v Lee*, 96 NY2d 157).

(6) Regarding the videotape, defendant stated he had "no objection" to its introduction when, on October 16, 2000, it was offered into evidence at trial. Accordingly, this claim is unpreserved and we decline to review it in the interest of justice (CPL 470.05 [2]; *People v Luperon*, 85 NY2d 71). Furthermore, defense counsel's earlier language on October 11, 2000 purporting to object was premature and, in any event, legally inadequate to constitute an "objection" (*id.*). Defendant argues that on October 11, when the People turned over to the defense copies of the videotaped demonstration and indicated they ***152** intended to offer the videotape into evidence on October 16, the defense uttered the following: "I suspect we'll object."

However, this faint expression, on its face, is nothing more than a prediction that defendant might--or

probably will in futuro--object to the video. Moreover, the Justice's immediate response--"I suspect I'll allow it"--is of no greater legal significance. It is, simply put, not a ruling in response to an actual objection based on then existing circumstances (*see People v Luperon, supra* at 78;*cf.* People v Balls, 69 NY2d 641, 642).

Notwithstanding defendant's characterization of that exchange as "wordplay," contending now it should be deemed a substantial legal objection, the attorney's words do not constitute an effective protest under CPL 470.05 (2), because the specific language would not, nor did it, prompt the court to make an actual ruling. While the attorneys and the court may have intuitively suspected what was on each other's mind, the legal process has not become, nor should it be, guesswork, mind reading, or fortune telling. Rather, it should be, and is, a process whereby trial attorneys announce an unambiguous objection, in praesenti, based on an articulated or otherwise known rationale involving logic, legal principles, and/or common sense, a protest which gives an adversary notice sufficient to frame a response, and affords the court an opportunity to issue a ruling. Defendant's so-called "objection" contains none of these ingredients.

We therefore reject as unpreserved defendant's present position regarding the video's admissibility, not because we revere form over substance, but, rather, out of our recognition of the indisputable need during a trial for clear language announcing candid and specific positions, after which judges may issue fitting rulings. Most important, if there existed any lingering ambiguity about whether defense counsel had or had not registered a cognizable objection on October 11, defense counsel himself resolved it on

October 16 when he said "no objection" at the moment the People actually offered the exhibits.

Furthermore, were we to reach the merits of the videotape's admissibility, we would reject the defense argument that its contents are based on pure speculation and thus were improperly placed before the jury. This entire case leaves no doubt whatever that the contents of the videotape depict a scenario that was anything but speculation. Rather, the tape's contents clearly demonstrate the feasibility of the People's theory of this case, a theory which all of the circumstantial proof together overwhelmingly shows.*153

We have examined defendant's remaining contentions and find them unavailing.

Accordingly, the judgment of the Supreme Court, New York County (Leslie Crocker Snyder, J.), rendered November 29, 2000, convicting defendant, after a jury trial, of murder in the second degree, and sentencing him to a term of 20 years to life should be affirmed.

Andrias, J.P., Saxe, Buckley and Friedman, JJ., concur.
Judgment, Supreme Court, New York County, rendered November 29, 2000, affirmed.*154

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N.Y.A.D.,2002.
PEOPLE v BIERENBAUM

301 A.D.2d 119

SUPREME COURT, NEW YORK.
NEW YORK COUNTY

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The People of the State of New York,

v.

Robert Bierenbaum,
Defendant.

----------X

Ruth Pickholz, J.

Defendant moves to vacate his conviction pursuant to CPL 440.10.

The defendant stands convicted of murder in the second degree and is currently serving a term of twenty years to life. His conviction was unanimously affirmed by the Appellate Division (*People v. Bierenbaum*, 301 AD2d 119). Leave to appeal to the Court of Appeals was denied, as was his petition for a writ of certiorari to the United States Supreme Court. He now moves to vacate his conviction on the ground that he was denied effective representation. As the decision by the Appellate Division discussed the evidence at trial at considerable length, I will only summarize the facts here, except where a more extensive recitation is necessary to fully understand defendant's current claims.[FN1]

FN1. Defendant argues that the Appellate Division decision interpreted the evidence against him more harshly than was argued by People on appeal. Without exception, the faults defendant finds in the inferences drawn by the Appellate Division are irrelevant to the issues before me.

Defendant's jury trial took place in the fall of 2000, approximately 15 years after the July 7, 1985 disappearance of his wife, Gail Katz. The proof at trial that linked him to her murder was purely circumstantial, Not only were there no witnesses to the crime, but the body of Ms. Katz was never recovered. The Appellate Division found that, notwithstanding its circumstantial nature, the evidence at trial permitted the jury to conclude beyond a reasonable doubt that defendant had killed his wife and disposed of the body in the manner posited by the People. The People's theory at trial was that, immediately after killing her, the defendant, a surgical resident, folded or disarticulated her body and stuffed into a large canvass duffel bag. He then took the bag out of their East 85th Street apartment and drove to the Essex County Airport in Caldwell, New Jersey. He rented a private plane from MacDan Aviation, put the bag on the plane, and flew the plane over the Atlantic Ocean. After dropping the bag out of the plane he returned and went to a family birthday party at his sister's home in Montclair, New Jersey. At the party he first told the story that he was to repeat many times with minor variation thereafter. The defendant told his father that he and Gail had argued in the morning and that she had left the apartment to go to Central Park. She had not yet returned and he was worried about her.

The police suspected early on that he had killed her. They believed him to be the last person who had seen her alive. Although he expressed concern for her the

day she disappeared, it did not appear that he had been in a special hurry to inform the police that she had not returned from the park, as he waited until 9:00 pm the next day to file a report. The police learned during their early investigation, which began shortly after he reported his wife missing, that he and his wife had an angry and difficult marriage. In 1983 she told several friends and relatives that he had caught her smoking and had choked her to the point of unconsciousness. This was one of several choking incidents. One acquaintance, Lee McCullough, observed bruises around her neck stemming from this incident. Ms. Katz confided in friends that she was afraid of her husband and that he had told her that he would kill her if she ever left him. She told a few people in the months preceding her disappearance that she was about ready to leave him. Investigators also discovered that defendant was a licensed pilot, and that he had flown a plane for an hour-and-45-minute flight on July 7, 1985. Although he discussed his actions on July 7 many times with friends, family and the police, defendant never mentioned this flight. This was far from the only instance in which he appeared to be misdirecting the police, hindering their efforts, diverting suspicion or simply lying about what had happened. He told Detective O'Malley, for example, that he had spoken with Edgar (Rivera) the Doorman who told him that he observed Ms. Katz leave the apartment building after 11:00 a.m. on July 7. When O'Malley later asked him about Rivera's statement, defendant retracted his claim and said that Edgar was not sure about the date. The police interviewed Rivera several days later. He told them that he had seen her on Saturday, July 6. He did not remember seeing her on July 7.

Despite their strong suspicions, the police had no body, no witnesses to the act, and no forensic evidence. Neither the apartment, the cars he had access to nor the plane he had flown yielded evidence of foul play. In April, 1987, after an extensive review of the investigation, four members of the District Attorney's Office who had been assigned to review the case concluded that the evidence against him would not sustain an indictment. The Office decided not to present the case to the grand jury.

The investigation into the disappearance of defendant's wife was dormant when, in May, 1989,a decomposed female torso washed-up on a Staten Island beach. The police subjected it to extensive testing in order to determine whether it was the body of Gail Katz. Although the experts who examined it did not universally agree, an amended death certificate was issued listing the torso as Gail Katz. The cause of death was listed as homicide. Despite the new evidence, the District Attorney's Office again decided not to present the investigation to the grand jury. More than a year later further testing proved that torso was that of another woman. Aside from this incident, there appears to have been little or no active investigation of the case for about nine years.

In 1996 the New York County District Attorney's Office formed a unit designed to investigate old, unsolved homicides. In 1997 the unit turned its attention to the disappearance of Gail Katz and decided to reopen the case. Investigators re-interviewed witnesses and attempted to develop new leads. One of the 90 people whom the investigators spoke to over the next two and one-half years was Roberta Karnofsky, who had been dating defendant

about the time of the original investigation and lived in his apartment for a number of months. Karnofsky had been uncooperative when first interviewed. She now told them that she and Sharon Alongi, another woman who had lived in the apartment with her and defendant, had come upon defendant's flight log in the apartment. They had examined it and seen that it contained an entry for a July 8, 1985 flight. When they examined the entry more closely they saw that it had been altered, and that the original entry read July 7, 1985, Investigators interviewed Alongi in May, 2000. She confirmed that the log book had been altered.[FN2]

Among others interviewed during the reopened investigation were four women whom defendant had dated during the 1990's. He had given them inconsistent versions of his wife's disappearance. Three of the four testified in the grand jury and two of them testified at trial as to these conversations. Investigators also interviewed Hillard Wiese and Dr. Michael Stone during this period. Wiese informed them that Gail Katz had spoken to him about the strangulation incident. Although the prosecution team knew of the 1983 incident from their initial investigation, they decided to seek admission of the

FN2. Although the fact that Alongi and Karnofsky would be able to testify that they had seen the altered entry would impact on the decision to prosecute, prosecutors did not subpoena the log from the defendant until after he had been indicted. Consequently, the delay in obtaining an indictment can not be excused by a need to obtain the log itself.

hearsay statement to Wiese as an excited utterance.[FN3] Investigators knew prior to 1987 that defendant had spoken in 1983 with Stone, a psychiatrist, concerning the strangulation incident and about starting therapy. The therapist had also spoken with Gail Katz about her relationship with her husband. During the first investigation Stone resisted the investigators' efforts to reveal the substance of any of his consultations. He was now willing to provide details of these conversations, as well as a letter he had written to Katz warning her that she was in possible danger from her husband. The discovery of this evidence factored into the decision to seek the indictment underlying the instant conviction.

Defendant claims that his conviction was obtained in violation of his rights under the New York State and United States constitutions. In determining whether an attorney has provided a criminal defendant with effective representation consonant with the requirements of its own constitution, New York applies a higher and more flexible standard than that derived from the Federal Constitution (*see* *People v. Benevento*, 91 NY2d 708). Under the federal standard set forth in *Strickland v. Washington* (466 US 668) a defendant must establish both that the attorney's performance was deficient, and, but for counsel's

FN3. The trial court granted the application to admit the statement on that ground. On appeal, the Appellate Division held that the introduction of the statement as an excited utterance had been harmless error, as the jury learned of the incident from other witnesses (*Bierenbaum*, 301 AD2d at 149).

unprofessional errors, there is a "reasonable probability" that the outcome of the proceedings

would have been different (*id* at 687, 694). The Court defined a "reasonable probability" as "a probability sufficient to undermine confidence in the outcome" (*id* at 694). In contrast, the State standard does not require a defendant to fully satisfy the *Strickland* prejudice test (*see People v. Stultz*, 2 NY3d 277, 284]. Under the State Constitution the focus is on the fairness of the proceedings as a whole (*see Benevento*, 91 NY2d at 714). The core inquiry is whether the defendant has received "meaningful representation" (*see People v. Baldi*, 54 NY2d 137). "So long as the evidence, the law, and the circumstances of a particular case, viewed in totality and as of the time of the representation, reveal that the attorney provided meaningful representation, the constitutional requirement will have been met"(id at 146-147). Trial tactics which terminate unsuccessfully do not automatically indicate ineffectiveness (id at 146-147), nor does the failure to make any particular motion (*see Stultz*, 2 NY3d at 287). Under the *Baldi*, "meaningful representation" standard a defendant must show that there was no "strategic or other legitimate explanation" for defense counsel's allegedly deficient conduct (*see People v. Rivera*, 71 NY2d 705, 709).

Although it is not an indispensable aspect of the *Baldi* standard, prejudice is still a "significant... element in assessing meaningful representation" (*Stultz*, 2 NY3d d at 284), A single error may constitute ineffective assistance under the State standard, but only when it is "sufficiently egregious and prejudicial as to compromise a defendant's right to a fair trial" [*People v. Hobot*, 84 NY2d 1021, 1022). On the other hand, "even in the absence of a reasonable probability of a different outcome, inadequacy of counsel will still

warrant reversal whenever a defendant is deprived of a fair trial" [*People v. Caban*, 5 NY3d 143).

Defendant raises numerous arguments in support of his contention that his attorneys were ineffective. He argues that the attorneys'[FN4] lapses began even before trial began when they failed to move to dismiss the indictment on the ground of excessive pre-indictment delay (see *People v. Singer*, 44 NY2d 241). His argument is as follows: The People did not indict him until 1999, more than fourteen years after Gail Katz disappeared. Their delay in bringing an indictment was unjustifiable, as, he contends, they did not have appreciably more evidence against him in 1999 than they had a decade or more earlier. To the extent that they uncovered more evidence during this period, it was either cumulative or of minimal value. If they developed any new evidence of value during this period, it could have been discovered before the initial investigation was abandoned, or it came to light after the defendant was indicted in 1999. Moreover, he continues, he was prejudiced by the passage of so many years. Fourteen years after the event the defense could not easily check the ancient

FN4. The defendant was represented by Scott Greenfield, Esq., who was primarily responsible for pre-trial motions, David L. Lewis, Esq., who had responsibility for conducting the trial, and Kathryn Kase, Esq. Mr. Greenfield was also one of two attorneys who represented the defendant upon his direct appeal

reports upon which the People relied, or cross-examine the dimmed memories of their witnesses. He argues that he was prejudiced because he was unable

to cross-examine several other witnesses who no longer remembered what they had said to the police and whose statements to investigators were therefore admitted into evidence as past recollections recorded. Additionally, some of the people who might have contradicted or given doubt to the prosecution's evidence no longer remembered the events of July 1985. Others, such as the Bierenbaum's housekeeper and the person who was in the office of MacDan Aviation when defendant rented the plane for his July 7, 1985 flight, were no longer available to testify in 2000. Had they still been available to testify at trial, he urges, they would have remembered specific details that would have been favorable to his case. In view of the People's unjustifiable delay in indicting the case, the great length of the delay and the prejudice suffered by the defense, a motion to dismiss on the ground of pre-indictment delay would have been granted.

The argument that defendant's attorneys were ineffective for failing to move to dismiss on the ground of unjustifiable pre-indictment delay is meritless, as there is no possibility that such a motion would have been granted. It is irrelevant that, as defendant argues, trial counsel "had nothing to lose" by making such a motion. In order to show that his attorney was ineffective, a defendant must show that he had some likelihood of prevailing on the motion that he contends should have been made. "A defendant is not denied effective assistance of trial counsel merely because counsel does not make a motion or argument that has little or no chance of success" (see *People v. Stultz*, 2 NY3d 277, 287; *see People v. Berry*, 15 AD3d 233). There was no chance of success in this case.

An unreasonable delay in prosecuting a defendant may constitute a denial of due process requiring dismissal of the charges against him (*see* People v. Staley, 41 NY2d 789, 791; Singer, 44 NY2d at 253) Five factors must be considered in determining whether a delay amounts to a denial of due process: the seriousness of the offense, the length of the delay, the reason for the delay, the degree that the defense has been impaired or prejudiced and the length of any pre-trial incarceration (*see, People v. Taranovich*, 37 NY2d 442; *People v. Bonsauger*, 91 AD2d 1001). In this case only the extreme length of the delay weighs in defendant's favor (cf. *People v. Vernace*, 96 NY2d 886 [17-year delay]; *People v. La Rocca*, 172 AD2d 628 [17-year delay]). Contrary to defendant's argument, he was not meaningfully prejudiced by the delay.

For the most part, defendant's specific claims of prejudice accruing from memory decay and the unavailability of witnesses do not withstand analysis. To be sure, the memories of all the witnesses had decayed with time, but that is always the case and does not prove undue prejudice to the defense (*see* People v. Lee, 234 AD2d 140, 143). Moreover, all the witnesses but one were prosecution witnesses. It is the People who bear the burden of proof, and for the most part they, not the defense, are prejudiced when the memories of prosecution witnesses are made hazy by the passage of time because their burden is made more difficult (see *People v. Varnace*, 96 NY2d at 888). Indeed, trial counsel argued this very point when, at the very beginning of the defense summation, he warned the jury that it was dangerous to rely upon "the chancy elements of the temperamental nature" of memories that were fifteen years old.

Many of defendant's arguments are founded upon unwarranted assumptions. There is no reason to assume that, had the trial taken place earlier, either the witnesses who testified for the prosecution or those who were unavailable in 2000 would have recalled facts that were helpful to the defense, rather than facts that were simply more damning. Also unpersuasive is the related argument that, were it not for the passage of so much time, trial counsel could have more easily refuted the testimony of many of the People's witnesses by checking their memories of events against records or documents that surely existed earlier but were no longer extant in 2000. It is mere conjecture that the employment and other records that defendant mentions would have contained information helpful to the defense. Defendant complains, for example, that trial counsel was unable to effectively cross-examine Denise Kastenbaum. Kastenbaum testified that at a July 6 meeting at the hairdresser, Katz told her that she was going to tell her husband that very weekend that she intended to leave him. Defendant contends that Mr. Lewis was stymied in his ability to cross-examine her on this point because after so many years the hairdresser's appointment book and the salon's employee records had been discarded. He suggests that these documents might have shown that the appointment took place on a different day. Alternatively, phone records no longer existed in 1999 which might have shown that the two did not speak on or about June 6 and therefore did not arrange to have their hair done on the same day. These speculations, as well as many others in which defendant engages, are unfounded. A similar analysis applies to the case folder of Detective Dalsass, which was lost in 1991. Dalsass testified that the defendant

did not return his phone calls during the early investigation. Defendant argues that, had the trial taken place prior to 1991, he might have been in a position to test the detective's statement that he failed to return the phone messages.[FN5] In neither of these cases nor others like them has defendant shown that he suffered actual prejudice.

The contention that prejudice accrued to defendant because of the introduction of a number of statements as past recollections recorded is conjectural. It is impossible to know what witnesses such as Lee McCullough, Edgar Rivera and Ellen Schwartz would have testified had they remembered the interviews that had given to the police. To assume that their testimony would have been more favorable to the defense than the statements that they gave investigators within a week or two of the disappearance , or that they would have contradicted their accounts of years before, is entirely speculative.

Defendant contends that he was severely prejudiced by the testimony of Maryanne DeCesare, who testified that Gail Katz told her that defendant repeatedly warned her that if she left him, he would kill her. According to, DeCesare, Katz once stated that during a television broadcast of a movie about Klaus Von

FN5. Furthermore, defendant could have moved for an adverse inference as to the loss of the book had he believed it in his strategic interest to do so.

Bulow, defendant told her that "the problem with Klaus Von Bulow is that he had left evidence and that he [defendant] would not leave evidence." Defendant argues that, as the body of his wife was never found,

this testimony was especially powerful. In 2001 researchers hired by defendant's current attorneys concluded after two weeks of exhaustive research that "Reversal of Fortune," was the only movie made about the Von Bulow case and that it was released in 1990, five years after Katz's disappearance.[FN6] Defendant argues that, had so much time not passed, it would have been possible to rebut Ms. DeCesare about her apparently confabulated and erroneous testimony. The difficulty in meeting such testimony fifteen years after the event, he continues, "where it arises for the first time during the heat of trial, is immense."

Defendant's argument is not compelling. It is unclear why it was any more difficult to meet such testimony in 2000 than it would have been a decade earlier. Assuming for the sake of argument that two weeks of extensive research are required to verify that there was only one movie that was based on the Von Bulow case and to ascertain its release date, those same two weeks would have been needed regardless of the date of the trial. The pressures inherent in meeting testimony in the heat of trial would also have been the same. The defense would therefore have confronted the same difficulty of rebutting Ms. Decasare's

FN6. The People assert that, even if that is the case, there were numerous televised news reports about the Von Bulow case that could have triggered defendant's comment to his wife, testimony no matter when the trial took place.[FN7]

Defendant claims that he suffered prejudice from the faded memory of Joel Davis, the sole defense witness. Davis testified that he had seen a missing-person poster of Gall Katz shortly after her disappearance

and had told the police that he had seen the woman pictured standing in line in a bagel store at 3:00 pm on July 7. The woman was standing near another female who was apparently her friend. Both were carrying beach bags. The police showed him a picture of Katz in late September, 1985. He identified the photograph as one of the two woman he had seen on July 7. Defense investigators interviewed him several months prior to trial, and the details he related to them were inconsistent with what he told the police years earlier and what he related in his direct examination. The People took advantage of these inconsistencies in cross-examination. Davis nevertheless testified that he was certain that the photograph of the woman he was shown in 1985, and which he was shown again at trial, depicted one of the women he had seen on July 7. A reading of his testimony leads to the conclusion that although he was certain in 1985 that he had seen Gail Katz in the bagel store, he no longer remembered enough about

FN7. It is impossible to assume anything about the substance of Ms. DeCesare's testimony had it given before the movie was released. There is no reason to believe, however, that it would have been any more favorable to the defense.

the sighting to be sure. Although Davis exhibited some confusion about the events of 1985, the defendant was not substantially prejudiced. Not only was Davis unshaken about his 1985 identification, but it is unlikely that the jury expected any witness to be as certain in 1999 about the events of 1985 as that witness was in the months immediately following the event. They probably found, as does defendant, that "since Davis ... [testified] completely from memory

about a sighting that occurred 15 years before, it [was] not surprising that he was inconsistent on certain details." If the jury discounted his testimony, it was primarily because it was simply improbable and contrary to established facts.

I find the other instances of prejudice alleged by defendant to be completely meritless. They are premised upon the most speculative of premises (e.g., that Janice Nuhic, a police aide who prepared the 1983 complaint report in which Gail Katz reported that defendant had strangled her to the point of unconsciousness, would have remembered taking the complaint from Ms. Katz had the trial taken place earlier). Even if defendant could have demonstrated that he suffered prejudice from the faded memories of witnesses, however, his dismissal motion would not have been granted.

Dismissal is not warranted where there is good cause for the delay (*People v. Lesiuk*, 81 NY2d 485, 490-491). The legitimate need of the police to gather sufficient evidence prior to the commencement of an investigation constitutes good cause (*Lesiuk*, 81 NY2d at 490). "Thus a determination made in good faith to defer commencement of the prosecution for further investigation or for other sufficient reasons, will not deprive the defendant of due process of law even though the delay may cause some prejudice to the defense" (*Singer*, 44 NY2d at 254).

The decision not to seek an indictment in 1987 can not be gainsaid. Not only was the evidence against the defendant purely circumstantial, but no homicide prosecution had ever been attempted in New York County to that time where there was no *corpus dilecti*.

Prosecutors knew that the jury would be instructed that they could only convict if the facts proved excluded, to a moral certainty, every reasonable hypothesis of innocence. It would have been foolhardy for them to proceed in the absence of evidence that did not satisfy this standard. Their 1987 decision not to prosecute was based on objective assessment of the evidence and was therefore made in good faith.

It is irrelevant that there was little or no active investigation of the case for ten years (*see* *People v. Vernace*, 96 NY2d 886). The People were not obligated to keep the case active during this period, as it would be impossible for them to continually investigate every case. Their determination to reopen the case in a fresh attempt to gather sufficient evidence to obtain a conviction was made in good faith and does not cast their 1987 decision to defer prosecution into doubt. Defendant contends that much of the evidence that the People developed during the reopened investigation was either cumulative of information that was known to them in 1987 or could have been discovered during the initial investigation. I disagree. Even if this were the case, however, it is immaterial. The decision to prosecute, like the determination of what constitutes sufficient evidence to obtain a conviction, is a discretionary and subjective prosecutorial function (see *People v. Denis*, 276 AD2d 237). Indeed, had the People simply indicted defendant in 1999 based on evidence that was substantially the same as the evidence in their possession in 1987, it is far from clear that the delay would have been unjustified in a case as unusual and difficult as this one (*see* *People v. Denis*, 276 AD2d 237). Additionally, there is no reason to believe that the prosecution's decision to reopen the case after ten

years proceeded from inappropriate motives (*cf. People v. Juan Rodriguez,* __ Misc 2d __, NYLJ 8/9/04). The People's further display of caution in 1997, deferring indictment until they determined that the evidence was strong enough to meet the circumstantial evidence standard, was also warranted.

That they ultimately did not or could not use all of the evidence discovered during the second investigation does not mean that the People unnecessarily delayed bringing an indictment or were not investigating in good faith. They attempted to introduce the testimony of Dr. Stone as well as various psychiatric records at trial, for example, but the defense successfully argued that this evidence was inadmissible. Some of the other evidence that they did not use suggested other leads, confirmed suspicions or other evidence, and factored into their decision to pursue an indictment. In addition, there was delay incurred while the People pursued leads that ultimately proved to be useless. Extensive scientific testing was performed on the torso discovered in Staten Island until it was definitively shown that it could not have belonged to Gail Katz. Accordingly, it is impossible to say that the People did not have good cause for the delay that occurred in this case (*see* People v. Mitchell, 301 AD2d 451).

In sum, although the pre-indictment delay was significant, defendant was not incarcerated at any time prior to trial. If he can be said to have suffered any prejudice from the delay, it was not substantial. Both the seriousness of the charge and the reason for the delay strongly militate against dismissal. The People proceeded in good faith and did not delay the

prosecution in the hope of gaining a tactical advantage. Their caution was justified by the complete lack of direct evidence against the defendant, as well as the absence of direct proof that Gail Katz was dead. For these reasons there is no possibility that a motion to dismiss on the basis of pre-indictment delay would have been granted. Defense counsel cannot be faulted, therefore, for not filing such a motion (*see* *People v. Mance*, 269 AD2d 188).

Defendant next takes exception to his attorneys' failure to interview and call The Bierenbaum's downstairs neighbor, June Sherman, and failure to call Pablo Alvarez, a building maintenance worker and occasional doorman. The police interviewed Sherman in June and October 1986. At that time the only relevant information that she was able to provide was that the Bierenbaums fought constantly. In 1998, when the case was reopened, an investigator spoke to her again. On this occasion she stated that the Bierenbaums always fought on Sunday and that she frequently heard Ms. Katz screaming and the sound of banging furniture, she usually heard the sound of heels and of furniture being moved. On the Sunday of the disappearance she heard the defendant yelling and his wife screaming, She heard a loud bang, which she assumed was the front door but which could have been any door, and then silence, The lead prosecutor also interviewed her in February 2000, at which time she gave additional details about the incident.

The People provided the defense with the investigator's report of his interview with Ms. Sherman six months prior to trial in response to a request for *Brady* material. The report was by then

two years old. Ms. Sherman had moved to Arizona, but the People gave the attorneys her Arizona address and telephone number. Trial counsel did not attempt to interview her or otherwise act on this information until October 2, 2000,[FN8] when they applied for an order to secure her attendance at trial pursuant to CPL 640.10. Attempts to serve her with process in Arizona proved unsuccessful and she never testified.

The defendant has appended a July 2004 affidavit from Sherman in support of his current motion. In it she states that she heard Ms. Katz screaming on the day of her disappearance and that she (Sherman) heard the sound of high heels making noises on the floor of the Bierenbaum apartment. She heard the door of the apartment slam followed by silence. Based upon her familiarity with Ms. Katz's voice and footsteps, she believed that Katz left the apartment.

Pablo Alvarez was employed as a maintenance worker in the Bierenbaum's apartment building. Nine days

FN8. The trial had commenced by this time. The People opened on October 2 and rested on October 18. Judge Snyder charged the jury on October 23.

After the disappearance Alvarez told Detective O'Malley that he did not remember seeing Ms. Katz leave the building on Sunday, July 7. He was again interviewed by the prosecution in 1999 and 2000. On both occasions he remembered neither the day or date that he had last seen her leave the building nor how she was dressed that day. In a July, 2004 affidavit he states that on the Sunday preceding the disappearance he relieved Edgar Rivera, the doorman, at 11:30 a.m. While on duty that day he saw Ms. Katz

leave the front entrance of the building wearing shorts and a t-shirt. He did not see her return. He also states that he provided this information to the defense in 2000.[FN9]

Mr. Lewis and Mr. Greenfield interviewed Alvarez prior to trial but decided not to call him to testify. Both attorneys now state in substance that they would have made the opposite decision had records existed at the time of the trial showing that both Rivera and Alvarez had worked July 7, 1985, and had they known that Ms. Sherman would have testified consonant with the affidavit she provided several years after the trial.

FN9. Alvarez additionally states that he testified before the grand jury but the People dispute this claim. I conclude that he innocently believed his 1999 interview with several assistant district attorneys to be a grand jury appearance. I reject the People's argument that his misconception casts the remainder of his affidavit into doubt.

The defendant argues that, had both Sherman and Alvarez testified, he would almost certainly have been acquitted. He contends that Sherman's account would have supported the defense theory that Ms. Katz left the apartment on Sunday afternoon and would have made the testimony of Joel Davis more credible. In his view their combined testimony would have made untenable the prosecution's central theory that the defendant killed his wife in the apartment on July 7 in the course of a violent argument. He also argues that their testimony would have undercut inferences that circumstantially strengthened the People's case. He suggests, for example, that had Alvarez testified,

trial counsel might have "put into play" the notion that defendant had confused Alvarez with the doorman Rivera when he told Detective O'Malley that Rivera had seen his wife leave the building on Sunday morning. If so, the prosecution would not have been able to argue that defendant evinced consciousness of guilt in lying to Detective O'Malley about his conversation with Rivera.

Although it would have been prudent to speak with Ms. Sherman at an earlier date, the defense made diligent efforts to secure her attendance as soon as the trial actually began. The People's case lasted more than two weeks, and it would have been reasonable to believe that she would be available in time to be interviewed and, if she proved to be a friendly witness, testify. That the efforts of defense counsel proved unavailing is not an indication of ineffectiveness. *People v. Donovan* (184 AD2d 654), upon which defendant relies for the contrary proposition, is inapposite. Morever, their decision not to rush to interview her can be explained by the fact that they already knew what she had told the prosecution's investigator, and considered her an unfriendly witness.[FN10] Whether or not their assessment of her hostility was correct, had she testified, it is as likely that her testimony would have hurt the defense as aided it. Not only was her account of the click of heels followed by the slam of a door completely inconsistent with defendant's statements to the police that his wife was wearing sandals when she left the apartment, but she told investigators that she only believed that it was the front door that she heard slam and that it could have been any door. If the jury believed that she had heard the sounds of "Gail screaming and Robert yelling", followed by the

slam of an interior door and sudden silence, it would have undermined the scenario suggested by the defense and strengthened the prosecution's theory that the defendant had killed her in the apartment. At the very least her report of the Bierenbaum's incessant cat-and-dog fights and her account of the screams and yelling she heard that morning would have been harmful to the defense. I also note that Ms. Sherman's inability to provide investigators with *any* relevant information about the day of the disappearance immediately after the event but ever-improving recall of detail as the years have would also have presented problems for the defense. Had she

FN10. In his affidavit, Mr. Greenfield states that he and Mr. Lewis assumed that Ms. Sherman "was not a friendly witness," as she never made an attempt to contact them.

testified it would have been especially difficult for Mr. Lewis to employ the argument he made in summation that it was dangerous to rely upon recent memories of ancient events. Trial counsel were therefore not ineffective for failing to obtain her testimony (*see* *People v. Llanos*, 13 AD3d 76; *People v. Brooks*, 283 AD2d 367).

Calling Alvarez would also have been problematic as he had repeatedly said that he did not remember seeing Ms. Katz leave the building on Sunday and could not recall what she was wearing that last time he had seen her. Trial counsel made a strategic decision not to call him in the absence of credible evidence buttressing the claims he had recently made to them to the contrary. If he told the jury that he recalled seeing her leave the building that day

wearing shorts and a t-shirt, as he told the defense in 2000, the prosecution would have discredited him with inconsistent statements he made as far back as 1985 and as recently as 2000. Defendant concedes that Alvarez's recollection was "shaky." He attempts to brush the inconsistencies in his several accounts aside with the claim that calling Alvarez to testify would nevertheless have permitted him to blunt the People's argument in summation that he (defendant) lied to Detective O'Malley about Edgar the doorman's sighting of his wife. According to defendant, had Alvarez testified it would have been persuasive evidence that Dr. Bierenbaum had not lied to O'Malley at all, but had truly been mistaken whether it had been Edgar Rivera, Edgar Acosta - - a porter - - or Pablo Alvarez whom he had spoken to and whether that individual, whoever it was, said what he had personally seen and when he saw it or what one of the others had told Alvarez he saw and when.

This argument is based upon a jumble of baseless speculations. Defendant provides no support for the possibility that someone other that Alvarez, "whoever it was," saw defendant's wife leave the building on July 7 and told either Alvarez or defendant what he had seen. Defendant and Rivera never made such a claim. Alvarez clearly states that he *personally* saw Ms. Katz leave the front of the building wearing shorts and a t-shirt. Defendant provides no affidavit from Acosta, the only remaining possibility. It is highly unlikely that the jury would have accepted defendant's premise had he managed to "put it into play." Furthermore, had the jury indeed accepted the speculation, it would not have altered the outcome of the trial. Not only was defendant's remark to O'Malley only one of many omissions and

misstatements but it pertained solely to consciousness of guilt.

Defendant also contends that he was prejudiced by numerous lapses and errors of judgment on the part of Mr. Lewis during the trial. The People preliminarily argue that the trial record contains sufficient facts to have permitted appellate review of defendant's claims and that he should therefore be precluded from raising them now (CPL 440.10 [2][c]). As I reject their argument I will address the alleged errors on the merits (see *People v. Brown*, 45 NY2d 852; *People v. Berry*, 15 AD3d 233; *People v. Harris*, 109 AD2d 351).

Defendant alleges that he was prejudiced by the attorney's concession in his opening to the jury that Gail Katz was dead and that she had died on July 7, 1985.[FN11] He argues that there was nothing to be gained by conceding that she was dead, as one or more jurors might have found that the People had not satisfied their burden of proving this element beyond a reasonable doubt. Conceding that she had died on July 7 was even worse, he continues, because it raised the possibility that the attorney knew this information because his client had confided it to him.[FN12] Defendant also argues that it gained nothing for his attorney to concede during the summation that he had once choked his wife and that he had a bad temper. He contends that the evidence of defendant's bad temper and the choking incident came from statements that Ms. Katz made to acquaintances, and could thus have been exaggerations or even fabrications. He adds that, although there might be reasons not to contest some or all of these issues, there was no reason to actively concede them.

FN11. He also stated in his summation that she was dead, but made no mention of her dying on July 7.

FN12. In an affidavit appended to defendant's motion, the attorney states that he made a strategic decision to concede these facts because he believed that "this would prevent the People from eliciting testimony from her family and friends in the nature of the impact of the victim's death on her family and friends."

Defendant was not prejudiced by his attorneys' concession that Ms. Katz was dead, as the proof presented permitted no other inference. Had they not made the tactical choice of defusing the issue in this manner they would have been put in the counter-productive and almost ludicrous position of arguing that she had vanished without a trace but was still alive fifteen years later. There was also sufficient proof in the record to have made it impossible for the attorney to have contested the choking incident and defendant's bad temper. The jury heard too many corroborative accounts to have had any doubts as to these facts and conceding them was therefore not prejudicial. Additionally, as is clear from the affidavits of trial counsel, Mr. Lewis made a strategic decision to concede them based on his assessment that they were necessary to show why the Bierenbaums sought counseling. His decision should not be second-guessed with the wisdom of hindsight (see *People v. Satterfield,* 66 NY2d 796,799; *People v. Sullivan,* 153 AD2d 223,227). Conceding that Ms, Katz died on July 7 was more questionable. Although concessions that are based upon a valid trial strategy cannot form the basis for a determination that an attorney was ineffective (see *People v. Lewis,* 13 AD3d 1171), the

logic underlying trial counsel's explanation for this concession is somewhat tenuous. If the concession was indeed unnecessary, the circumstances surrounding the disappearance of Ms. Katz as well as other evidence in the case nevertheless compel the conclusion that she indeed died on July 7.

Defendant faults Mr. Lewis for stating in his opening to the jury that "the police conducted a forensic examination of the doctor's apartment [as well as the cars he used and the airplane he had flown on July 7] ... and found no evidence of blood or any other biological determinations" that supported the People's theory of the case. Defendant claims that, but for this remark, he would not have been prejudiced by testimony which permitted the prosecutor to argue that he had prevented the police from uncovering inculpatory evidence. Judge Snyder subsequently ruled that the attorney's statement had opened the door to testimony that defendant had ignored or forestalled several requests from Detective Dalsass to search the apartment. The detective was also permitted to testify that after defendant finally consented to a search conducted in September, 1985, his attorney, Mr. Greenfield, limited it to a search for Ms. Katz's fingerprints, diary and address book. He further testified that crime-scene technicians were prevented from conducting a full search of the apartment and that he [Dalsass] was followed everywhere about the apartment but the bathroom by an investigator hired by the defendant. Judge Snyder also permitted the prosecutor to argue in his summation that defendant had lied in stating to his girlfriend, Karen Caruana,[FN13] that the police searched his apartment and found nothing. He then stated:

[The] cops hadn't searched anything yet. One of the main reasons is because the defendant wouldn't let them search the apartment. The defendant and his

FN13. The defendant began a romantic liaison with Caruana within several weeks of his wife's disappearance.

attorney stopped the cops from doing a complete forensic search on the apartment. Ladies and gentlemen, eyeballing the bathtub and walking around the apartment are no substitute for a complete forensic search .... In the affirmation appended to the instant motion, Mr. Lewis states that his statement to the jury that the police had searched the apartment but found no blood or biological evidence was based on his "understanding of what occurred during the police investigation of Ms. Bierenbaum's disappearance." Defendant notes, however, that the People had previously informed him that the Mr. Greenfield had prevented the police from police from conducting a full search. In a proceeding that took place two months before the start of the trial, the People unequivocally stated in colloquy that "there were no extensive tests done. Mr. Greenfield wouldn't allow it. The only thing that Mr. Greenfield would allow [was for the police] to come in and dust for prints."

Defendant was not prejudiced by the introduction of the testimony because the People's discussion of the search, when viewed in the context of their entire summation, was of very limited effect. They never argued that the defendant or Mr. Greenfield refused to permit the police to conduct full search because he had something to hide, or because he was guilty. Rather, they utilized the search to show that he had

lied to Caruana, as he had lied to her about other things and had lied to many other people, in order "to deceive, to cast suspicion elsewhere, or to remove it if it [was] cast on him." As the lie to Caruana about the search only one of many to which they referred, it did not play a prominent part in their summation. Moreover, the lie was relevant only as to defendant's consciousness of guilt.

Additionally, Mr. Lewis's cross-examination of Detective Dalsass dissipated any prejudice that his client otherwise might have suffered from the introduction of the detective's direct testimony. He first elicited testimony showing that defendant was slow to consent to a search of his apartment because he wanted to consult an attorney. He then elicited from the detective that the defendant consented to the search, and that it was only Mr. Greenfield who imposed limitations on it:

Question: On the 12th did he [defendant] give you verbal permission to search his apartment for forensic evidence?

Answer: Mr. Greenfield did,

Question: Did Dr. Bierenbaum give you permission?

Answer: Yes, he did.

Question: To search the apartment for forensic evidence, right?

Answer: Correct, but there were stipulations made at that time.

Question: This was on the 12th there was a stipulation made, or later?

Answer: On the 30th.

Question: So on the 12th Dr. Bierenbaum gave you permission to search?

Answer: He did.

Question: And it was only later when you went to the apartment, that Mr. Greenfield stopped you from doing the search that you wanted to do, right?

Answer: That is correct.

Question: And despite the fact that, you tried to continue to do it anyway, right, somewhat - -

Answer: As best as I could.

Mr. Lewis thus contrasted defendant's willingness to permit the search with Mr. Greenfield's refusal. In laying the blame for the inability of the police to conduct a full search to an attorney, who could be expected to be an obstructionist under any circumstances, Mr. Lewis dispelled the notion that the defendant felt a consciousness of guilt. Judge Snyder instructed the jury at the close of the case that "the defendant has no legal obligation to allow the police to search his apartment at any point .... I want to remind you that every individual has a right to an attorney and you can draw no negative inference from the fact that someone hires an attorney." Mr. Lewis's cross-examination, in conjunction with the court's instruction, ameliorated any remaining prejudice

which may have accrued to the defendant from the opening remark.

Defendant next accuses Mr. Lewis of failing to utilize impeachment material which, he claims, would have supported his argument in summation that Ms. Katz was killed in a drug deal gone awry in Central Park. The genesis of this argument primarily lay in the testimony of Stephanie Youngblood and Anthony Segalas. Youngblood, who lived with the defendant in 1990, testified that he told her that his wife had a drug problem. He expressed his belief to her that his wife had left the apartment to "hang out with her druggie friends" in Central Park, where she had probably been murdered. Segalas carried on an affair with Ms. Katz during the last few years of her marriage. He testified that he and Ms. Katz twice "did cocaine" together. On one of the two occasions she told him that she suspected that she had been cheated by a girlfriend who had supplied her with the drug and asked him to come over to verify that the substance she purchased was cocaine. Segalas also testified that he was a recreational cocaine user but that Ms. Katz was very naive and didn't appear to know anything about the drug.

On the basis of this testimony (and evidence that Ms. Katz had an unconsummated relationship with Kenneth Feiner, a psychologist whom she met on the subway in 1985) Mr. Lewis argued in summation that Ms. Katz was prone to engage in dangerous behavior. He raised the possibility that she was killed by drug dealers in the course of a drug deal in the dangerous Central Park that existed "before-Giuliani." The People scoffed at this argument in their summation and knocked down each of its underpinnings in turn.

They argued that the men with whom she sought relationships were not risky types, but a Ph.D. and an investment manager. Far from being someone with a drug problem, Ms. Katz was, according to Segalas, a neophyte, naive when it came to cocaine, She was supplied not by drug dealers in Central Park, but by her girlfriend. There was only defendant's say-so that she had "druggie friends." They derided his statement to Youngblood as an attempt to cast suspicion elsewhere.

Defendant now argues that Mr. Lewis showed a lapse in professional judgment in failing to cross-examine Segalas with his 1985 statement to Detective Dalsass that he and Ms. Katz "did cocaine on numerous occasions." He contends that, had the attorney cross-examined Segalas with the statement, it would have been more difficult for the prosecution to disparage the possibility that the death of Ms. Katz was related to her drug use. In addition, the statement would have made it more credible that defendant believed that his wife died as a result of her involvement with unsavory acquaintances who were involved with drugs. In his affidavit, Mr. Lewis states that he did not see the necessity of cross-examining Segalas with the inconsistency. I find that there would have been little utility in doing so.

Had the jury credited that Segalas and Ms. Katz took cocaine together on numerous occasions, instead of just twice, it would not have made the theory that her death was somehow related to her drug use significantly more viable. The theory was constructed of gossamer and did not withstand scrutiny. The fact remains, whether it heard that Ms. Katz took cocaine twice or twenty times, the jury was presented with no

proof of dangerous drug suppliers in Central Park, but only an apparently innocuous "girlfriend." Ms. Katz did not seem to be the type of person who associated with people who were the least bit shady. None of the parade of her friends and acquaintances who testified, even the few like Segalas and Feiner who had questionable morals, appeared to be of that ilk. It was hard to believe that she would seek out someone with the potential to do her harm.

Similarly, it is unlikely that confronting Segalas with his inconsistent statement would have countered the inference that defendant was merely attempting to cast suspicion elsewhere with his statement to Youngblood. The problem is not only that there was no proof that the death of Ms. Katz was related to her drug use, but that the defendant expressed so many different theories about her death that it is difficult to credit that he was sincere or had a basis to believe any one of them. As the Appellate Division noted,

[h]e was inconsistent about his purported knowledge of his wife's post-July 7 whereabouts, alluding to different theories and purported sightings to different people. Defendant variously suggested or stated that his wife was wandering around Central Park in "a fugue state," that she had a drug problem and ran off with drug dealers, that she possibly committed suicide, that she was on a shopping spree at Bloomingdale's, that she left to hang out with "druggie friends," that she might have been killed by drug dealers, and that she had left for the Carribean to be with a boyfriend. In one instance he falsely claimed that a private detective, whom he also claimed he hired to find her, learned she was living in California with financial support from her family. Not

a single shred of evidence in this record supports any of these bizarre claims. *Bierenbaum*, 301 AD2d at 136

The sheer number and variety of these explanations leads to the inference that they were nothing more than fabrications that defendant devised to allay suspicions about himself. Again, the same conclusion is drawn whether Segalas and Ms. Katz used cocaine together only twice or numerous times. As the 1985 statement would therefore not have had any impact on the jury's acceptance of the drug theory, or countered the inference that defendant manufactured the theory to remove suspicion from himself, trial counsel's failure to utilize it did not constitute ineffectiveness of counsel (*see People v. Myers,* 283 AD2d 259).

Defendant asserts that trial counsel was ineffective for failing to object to the introduction of three videotapes demonstrating how a single person could load a 110 bag of sand onto a Cessna 172 (the make and model of the plane flown by defendant on July 7), pilot the plane and drop the bag into the ocean. This contention is without merit, as the Appellate Division indicated by way of dictum that the videotapes were properly placed before the jury (*see* *People v. Bierenbaum*, 301 AD2d 119, 152). As the evidence in question was admissible, the attorney was not ineffective in failing to object to its introduction (*see* *People v. Wigfall*, 288 AD2d 41; *People v. Smith*, 278 AD2d 154).

Defendant's many claims about trial counsel's failure to object to various parts of the People's summation are similarly without merit. Mr. Lewis explains in his affidavit that he was wary of objecting during the

summation because he was afraid that if he did, the court would sum up on these points in aid of the prosecution.[FN14] He instead chose to move for a mistrial on three of these grounds at the end of the summation. Trial counsel's strategic decision not to make contemporaneous objections because they were not worth the risk that they entailed was a legitimate one (*see* *People v. Taylor*, 1 NY3d 174, 177). Defendant argues that, to the extent that the reason for his attorney's failure to object was based on such a consideration, CPL 470.05, which required him to object in order to preserve an issue for appellate review, conflicts with his state and federal right to effective counsel. Defendant cites no authority which directly supports this proposition and I reject it.

Assuming, for the sake of argument, that trial counsel's concern did not constitute a valid tactical consideration, he was still not ineffective for failing to make timely objections during the prosecutor's

FN14. When he moved for a mistrial at the close of summations Mr. Lewis gave the trial court a different explanation for his conduct. At that time he explained that he was afraid that if he had objected to during the People's summation, he would have invited additional attention to the prosecutor's arguments. Judge Snyder found his explanation "disingenuous." Although there was likely some truth to counsel's explanation, the primary reason for his reluctance was undoubtedly the fear expressed in Mr. Lewis's affidavit, which could not easily have been stated to the trial court, Whether his decision was based on the first consideration, the second or a combination of the two is immaterial, as both are valid strategic considerations (*see* *People v. Taylor*, 1 NY3d 174, 177).

summation, as the latter made no comments which would have required reversal of the conviction. Although a few of his comments were marginally objectionable, the summation as whole did not render the trial unfair. As explained below, had trial counsel contemporaneously objected he would only have preserved meritless issues for appeal.

The prosecutor's summation was not inflammatory. His evocation of a strangling was somewhat graphic, but not excessively or gratuitously so. He described what likely transpired in order to explain both how defendant came to kill her and how he could have done so without leaving forensic evidence. Although there was no direct evidence that he had killed her in this manner, the prosecutor's argument that he had strangled her was based on inferences that could reasonably be drawn from the evidence (*see* People v. Yu Dong, 16 AD3d 349). His reference to the 1983 choking incident was also proper. In describing how Ms. Bierenbaum might have met her death at defendant's hands, the prosecutor compared it to the 1983 incident not for the purpose of arguing that the defendant had violent propensities, but to establish his identity as the murderer and his criminal intent. Evidence of the incident was properly admitted at trial pursuant to *People v. Molineux* (168 NY 264) for these very purposes. The prosecutor's arguments involving the 1983 incident did not stray from any of these permissible areas. I also note that the Appellate Division stated in dictum that "the prosecutor's arguments on the subject [of the 1983 incident] when viewed in the complete context of the closing statements, do not warrant reversal" (*Bierenbaum*, 301 AD2d at 150).

The defendant next contends that trial counsel should

have objected to the prosecutor's comment that he "wouldn't let [the police] search the apartment. The defendant and his attorney stopped the cops from doing a complete forensic search on the apartment." As noted, the prosecutor made this comment to illustrate his argument that defendant lied to acquaintances in order to divert suspicion. This argument was entirely proper. He never suggested that the jury could draw a negative inference from defendant's (or his attorney's) refusal to permit a search, or from defendant's employment of an attorney. *Moreover,* after trial counsel moved for a mistrial on this ground, Judge Snyder gave a curative instruction to the jury as to the prosecutor's comments in the course of her charge. It would therefore not have availed defendant had the attorney preserved the issue for appeal.

Trial counsel also moved for a mistrial based on the prosecutor's comments in summation regarding the description that defendant gave to the police of his wife's clothing, The attorney had unsuccessfully attempted to introduce evidence that, eleven or twelve days after the disappearance, defendant filled out a police form indicating that his wife went to Central Park on July 7 wearing a white t-shirt bearing the word "Aparados." The description was not consistent with several other descriptions of the shirt that the defendant orally gave to the police when he first spoke to them. On these occasions he described the shirt only as a white t-shirt. The trial court precluded all reference to the form on the ground that it was unreliable, "self-serving" hearsay. Consequently, the jury heard only that the defendant twice told O'Malley and twice told Dalsass that his wife was wearing a white t-shirt when she left the apartment.

The ruling impacted adversely on the defense because Joel Davis testified that the woman he saw in the bagel store was wearing a multicolored t-shirt with a "distinctive print," "something like a map or an island" with "a foreign name" Davis was 90 percent certain that the foreign name was "Aparados."

In his summation the prosecutor argued that Davis was mistaken and confused when he reported seeing a woman who could have been Gail Katz. He pointed out disparities between Davis's description of the woman he had seen, and known physical characteristics of Katz. He also highlighted the fact that Davis's description of the shirt worn by the woman in the bagel store did not match the defendant's description of his wife's t-shirt:

> The description of the multi-colored t-shirt versus the white t-shirt the defendant sees her leaving with. A map or island covering 80 percent of the t-shirt versus the white shirt. The t-shirt she's wearing with writing on it, with the defendant, said it is a white t-shirt [;] with the description of the writing versus the description of the defendant with a white t-shirt [;] one, two or three words versus the defendant's description of a white t-shirt.

Trial counsel moved for a mistrial on the ground that, as the prosecutor was aware that the defendant had filled out a form indicating that the t-shirt worn by his wife had the word "Aparados" written on it, his comments that there was no evidence supporting Davis's description of the t-shirt, and that defendant's description of the shirt contradicted that of Davis, were improper. The trial court called trial counsel's argument "misleading" and denied the application.

I find that trial counsel mischaracterized the prosecutor's comment, as does defendant in the instant motion. Contrary to defendant's contention, the prosecutor neither stated nor implied that there was no evidence supporting Davis's description of the t-shirt, or that defendant never reported that there was writing on the shirt. His argument was only that Davis's description contradicted what defendant told the police on four different occasions. As the argument is meritless, it would not have availed defendant for his attorney to have preserved it.

Defendant argues that trial counsel was ineffective for failing to object to two parts of the prosecutor's summation, which, he contends, impermissibly shifted the burden of proof. Neither of these claims has merit. The prosecutor was entitled to argue that defendant was lying when he told Karen Caruana that he hired a private investigator who found evidence that his wife was alive and living in California. He did not shift the burden of proof by suggesting that if defendant's statement were true, "the investigator would be testifying about the evidence from the witness stand." The prosecutor's statement was made only in the context of establishing that defendant had lied to Caruana. It contained no suggestion that defendant was obligated to prove that his wife was still alive. In addition, it would have been meaningless for trial counsel to have objected on that ground. The issue was no longer in the case, as he had conceded at the beginning of the trial that she was dead. Nor did the prosecutor change the burden of proof by rhetorically asking, in regard to defendant's theory that drug dealers had killed his wife, "where's the evidence?... where's the proof?" The People may respond in summation to arguments raised by the

defense (*see* *People v. Martinez*, 302 AD2d 271; *People v. Robinson*, 298 AD2d 161). Defendant had come forward with the theory that risky behavior on the part of Ms. Katz led to her death, and it was therefore permissible for the prosecutor to respond in summation that there was little or no evidence to corroborate that hypothesis (see *People v. Overlee*, 236 AD2d 133, 143; *People v. Gathers*, 207 AD2d 751; *People v. Tankleff*; 84 NY2d 992).

Defendant additionally argues that his attorney should have objected when, he claims, the prosecutor attacked his [trial counsel's] integrity. The statements that "to a large extent during the summation [trial counsel] distorted the record" and "has even ... gone so as to make some facts up" were arguably excessive. Even so, they fell far short of the type of comment that would have required reversal of the conviction (*see* *People v. Long*, 81 AD2d 521; *People v. Spruill*, 5 AD3d 318; *People v. LaPorte*, 306 AD2d 93; *People v. Diaz*, 170 AD2d 202, *amended on other grounds* 172 AD2d 341). In addition, to the extent that these comments were objectionable, they were isolated. His summation was not pervaded with flagrant examples of misconduct which would deprive defendant of due process (*see* *People v. D'Alessandro*, 184 AD2d 114; *People v. Cobb*, 188 AD2d 308). His comment to the jury that trial counsel "was hoping you will grasp at straws" was made in response to defendant's argument that the death of Ms. Katz was somehow tied to her drug use and was not improper (*see* *People v. Salaman*, 231 AD2d 464; *People v. Torres*, 220 AD2d 269). For similar reasons it was not improper for the prosecutor to state, in substance, that several of trial counsel's arguments were far-fetched or not based on the evidence in the case. These comments

did not exceed the "broad bounds of rhetorical comment permissible in closing argument" (*see People v. Galloway*, 54 NY2d 396,399). There was also nothing objectionable about his comment that trial counsel was trying to "disconnect the evidence." The statement, which was made in the context of the prosecutor's argument that each piece of evidence should be viewed as part of the whole and not in a vacuum, did not constitute a personal attack.

Defendant claims that trial counsel did not present evidence that might have countered the prosecution's argument that he had to be prodded to report his wife missing. He argues that Mr. Lewis should have brought certain provisions of the 1985 New York Police Department Patrol Guide to the jury's attention. The Guide provided that, "Missing Persons do not include. [p]ersons eighteen years of age or older, who have left home voluntarily because of domestic, financial or similar reasons." Under guidelines in effect at that time Ms. Katz would not have qualified as a missing person until enough time passed to permit the police to infer that she was "absent under circumstances indicating unaccountable or involuntary disappearance." Mr. Lewis states that he was aware of these provisions, but did not consider them relevant.

Trial counsel did not show a lapse of judgment in ignoring the provisions. They were irrelevant to the issues at trial, as there is no proof that defendant was aware of them or that they influenced his conduct. What was important was whether he, not the police, considered his wife missing. The Guide provisions were not germane to the prosecution's argument that he waited a surprisingly long time before going to the

police and that he appeared to dragging his feet despite the repeated urging of his wife's teacher and friend, Dr. Yvette Reis, that he seek their help in finding her. As the Guide was not relevant to his apparent lack of concern, or his motivation in seeking to delay the entry of the police into the case, it seems probable that the trial court would not have permitted trial counsel to introduce the provisions in question on the defense case or cross-examine Detective O'Malley as to the issue defendant now raises. Had the court permitted the jury to learn of the guidelines, it would not have affected the outcome of the trial. Trial counsel's judgment was correct and he was justified in not bringing the Patrol Guide provisions to the jury's attention.

Defendant's attorneys were not ineffective for failing to request that the jury be charged on the issue of territorial jurisdiction. Assuming, for the sake of argument, that there was no tactical reason not to request such a charge, the attorneys were nevertheless not ineffective because the jury could not have found that defendant committed the murder but that New York did not have territorial jurisdiction over the crime.

CPL 20.20 provides in pertinent part that

a person may be convicted in the criminal courts of this state of an offense defined by the laws of this state, committed ... by his own conduct ... when:

1. Conduct occurred within this state sufficient to establish:

(a) An element of such offense ....

The State of New York has territorial jurisdiction over a homicide constituting the crime of murder in the second degree if the murderer either formulated the intent to bring about the death of the victim or caused her death in this state (*see* *People v. Tullo*, 34 NY2d 712; *People v. Guidice*, 83 NY2d 630; *People v. Seifert*, 113 AD2d 80). The People's theory of the case, and the only reasonable version of the murder permitted by the evidence presented, is that he killed her in their Manhattan apartment, folded or disarticulated her body, stuffed it in a duffel bag, smuggled it out of the building and took it to New Jersey. If defendant killed her, therefore, he brought about her death in this jurisdiction.

Defendant contends, without explanation, that it was possible for the jury to have found that, if defendant killed his wife, he did so in New Jersey. The jury was instructed that it was to decide the issue of guilt based solely upon the evidence admitted at trial and was not engage in speculation or guesswork. It is difficult to discern how it might have found the victim was killed in a manner other than that urged by the People and not engage in engage in speculation or guesswork. If the jury had accepted that defendant did not kill his wife until after he left this state, it would have had to find that Ms. Katz was unconscious but still alive after the defendant folded and stuffed her body in a flight bag and drove it the airport.

Even allowing for the possibility that the jury could have accepted such a scenario, it still would have found that New York had jurisdiction over the crime. It was undisputed that defendant and his wife resided in New York. Every incident shedding light on their relationship and his intentions toward his wife

occurred in this jurisdiction. The evidence established that it was in New York that the marriage began to become acrimonious and unravel. It was there that she heard from him that he would harm her if she left him, choked her in 1983, told Edward Doucet that he hated her so much that he could kill her and gave reason to his psychiatrist to send a letter to her to warn her that she was in danger from him. If the issue had been put before the jury, it could only have found that defendant formulated an intent to murder his wife in New York. There was simply no other possibility. For this reason, New York had territorial jurisdiction to prosecute the homicide (*see* People v. Seifert, 113 AD2d 80). As the evidence established that jurisdiction existed pursuant to CPL 20.20 (1)(a), trial counsel were not ineffective in failing to ask that the jury be instructed on the issue (*see People v. Carvajal,* 14 AD3d 165,173).

I reject the argument that defense counsel were ineffective for failing to move for a trial order of dismissal on the ground that there was insufficient evidence of defendant's intent to kill his wife. It would have been pointless to make such a motion, as the record is replete with evidence from which the jury could have inferred, beyond a reasonable doubt, that defendant had the specific intent required by the statute. This evidence, in conjunction with other evidence establishing that he had a motive to kill her, included proof that the defendant and his wife had a turbulent marriage; that he told his friend, Edward Doucet, that he hated his wife so much that he could kill her; that he admitted to Dr. Feis that they had an explosive argument with her the morning of her disappearance; that she had received a letter from his psychiatrist warning her that he had the potential to

do her harm; that he had threatened to kill her if she ever left him and that she intended to tell him the weekend of her disappearance that she was going to leave him: that he had choked her and rendered her unconscious in 1983. Thus, had defendant's trial attorneys moved for a trial order of dismissal on this specific point, they would only have preserved a meritless issue for appellate review. As the Appellate Division noted, "This abundant array of damning circumstantial evidence proves beyond any reasonable doubt that defendant intentionally killed this victim..." (*Bierenbaum*, 301 AD2d at 133).

In a letter dated January 12, 2005, defendant raises an additional claim of ineffectiveness. Conceding that it would have been difficult for trial counsel to have discovered during the trial that the only motion picture made about the Von Bulow case was released in 1990, he nevertheless argues that nothing prevented the attorneys from conducting research on this issue in the five weeks between verdict and sentence. Their failure to do such research, he contends, constituted ineffectiveness of counsel. I find that trial counsel were not ineffective in failing to focus on this relatively minor aspect of the trial in the few weeks between verdict and sentence. It would have been remarkable if the possibility occurred to either of them in those weeks, ten years after the release of the movie, and almost twenty years after the Von Bulow trial, that no movie dealing with the murder was released in 1984 or 1985.[FN15] Moreover,

FN15. Defendant states that appellate counsel conducted two weeks of exhaustive research to confirm this fact. He does not state when it occurred to appellate counsel to investigate the matter.

had trial counsel discovered this fact before sentence, their only option would have been to bring a motion to set aside the verdict pursuant to CPL 330.30, but such a motion would have been denied. Counsel could not have successfully moved under subdivision one of the statute because defendant's claims concerning the movie did not appear on the record (CPL 330,30 [1]). Subdivision one was also foreclosed to them because defendant's contention concerning the movie only cast a portion of Ms. DeCesare's testimony into doubt, It would not have required reversal of the conviction as a matter of law (CPL 330.30 [1]: *see People v. Carter*, 63 NY2d 530, 536; *People v. Johnson*, 220 AD2d 294). Subdivision two is inapplicable on its face. A motion made pursuant to subdivision three (newly discovered evidence) would also have been denied, as the new evidence merely impeached or contradicted Ms. DeCesare's testimony and would not have changed the outcome of the trial (*see People v. Salemi*, 309 NY 208: *People v. Williams*, 19 AD3d 228).

CONCLUSION

I find that the defendant was afforded meaningful representation under the New York State Constitution. The defense was faced with a difficult task. The case against the defendant was not straightforward. As there was no direct proof that defendant murdered his wife, the People relied on many small pieces of circumstantial evidence to prove their case. In building the case against the defendant they wove together the testimony of over thirty witnesses. The combined testimony of these witnesses permitted the jury to infer that the defendant had a

motive and intent to kill his wife, the opportunity to kill her, the capability of doing so, and the means of covering up the crime. The People established that he was the last credible person to have seen her alive. They also established that Ms. Katz was not suicidal that it was not likely that she died at the hands of anyone besides her husband. Lastly, they showed that defendant did not appear to be worried about his wife's disappearance, that he displayed no urgency in finding her and engaged in behavior which seemed designed to hinder the police and allay suspicion. Although the People's evidence was overwhelming as a whole, no one constituent piece of evidence was alone dispositive of guilt. In fact, the opposite was true; no one or two pieces of evidence proved much of anything. It was precisely because the case was so amorphous and built of so many components that it was so difficult to defend.

Trial counsel began their defense in advance of trial by moving for discovery and for hearings designed to limit the evidence available to the prosecution at trial. They were at least partially successful in their efforts to preclude such evidence. Trial counsel also effectively represented the defendant during the trial. The defense did not have the option of concentrating on a few key witnesses who formed the lynchpin of the People's case - there were no such witnesses. Instead, Mr. Lewis concentrated on the alternatives open to him. He cross-examined the People's witnesses effectively and attempted to sow doubt in as many places as possible. In his summation he attacked the People's case by concentrating on its individual components, undermining each as best he could. He argued that the memories of the People's witnesses could not be trusted after so many years and that

there was little or no evidence underlying the basic premises upon which the People based their theory of the case. He argued, for example, that there was no evidence underlying their theory that on the weekend in question, events had converged which acted as a flashpoint for the murder. He emphasized that there was no evidence that the defendant was capable of transporting his wife's body from their apartment to an airplane, or that he transported it in fact, loaded it aboard the plane and flew the plane in the direction claimed by the People. He also attempted to divert the jury from the force of the People's over-all case by focusing on individual witnesses and subsidiary issues, in each instance showing how various innocent inferences could be drawn from the evidence. The fact that log book entry for July 7 had been changed proved nothing, he argued; defendant had altered or crossed out many entries in the book. He also utilized the testimony of Joel Davis effectively and argued that just because the prosecutor was able to befuddle Davis on the Witness stand, 15 years after the disappearance, did not mean that he had not seen Ms. Katz in 1985. He was also careful to argue that, even if the jury discounted Davis's testimony, the People's burden did not change. He put forward alternative hypotheses for her disappearance, including the possibility that she was killed by drug dealers in Central Park.

That is not to say that the defense was perfect in every particular. Mistakes were made. But "[t]he Constitution guarantees the accused a fair trial, not necessarily a perfect one. The phrase 'meaningful representation' does not mean 'perfect representation' " (*Benevento*, 91 NY2d at 712: *internal citations and some internal punctuation omitted*). The mistakes and

misjudgments which trial counsel made were not so egregious and prejudicial that they deprived him of a fair trial (*see People v. Flores,* 84 NY2d 188-189: People v. Hobot, 84 NY2f 1021, 1022).

In view of the fact that the *Baldi,* "meaningful representation" standard offers a defendant greater protections than the *Strickland* test, and as I conclude that defendant was afforded meaningful representation under the State Constitution, I find that his attorneys necessarily provided effective representation under the United States Constitution as well (*see* *People v. Caban*, 5 NY3d 143). Accordingly, defendant's application is denied in its entirety.

UNITED STATES DISTRICT COURT,
S.D. NEW YORK

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Robert Bierenbaum,

Petitioner,

Harold C. Graham, the Superintendent of
Auburn Correctional Facility, Eliot Spitzer,
Attorney General State of New York,

Respondents.

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Judges
Sweet, Hon. Robert W.
United States District Court, Southern New York
New York

Attorneys
Attorneys for Petitioner
Seiden, Mark
Miami, Florida

Silvers, Marcia J.
Miami, Florida

Attorneys for Respondent
Dwyer, Mark R.
New York, New York

OPINION OF THE COURT

SWEET, District Judge.

*1 Petitioner, Robert Bierenbaum ("Bierenbaum" or the "Petitioner") has filed a petition pursuant to 28 U.S.C. § 2254(d), for habeas corpus relief from a judgment of the Supreme Court of the State of New York, County of New York rendered on November 29, 2000 upon his conviction after a jury trial of murder in the second degree (N.Y. Penal Law § 125.25[1]). For the reasons set forth below, the petition is denied.

Prior Proceedings

Petitioner last saw his wife, Gail Katz Bierenbaum ("Katz"), on July 7, 1985. An investigation was conducted, and her body was never found. Petitioner was charged in 1999 in New York County Indictment No. 8295/99 with Murder in the Second Degree for killing his wife. After a trial before the Honorable Leslie Crocker Snyder and a jury on October 24, 2000, the jury found Petitioner guilty as charged. Petitioner was sentenced on November 29, 2000, to a prison term of 20 years to life, which he is currently serving.

On appeal, Petitioner contended that his guilt of his wife's murder was not proved beyond a reasonable doubt, that hearsay evidence was wrongly admitted against him, and that certain other trial errors were committed. The Appellate Division, First Department, affirmed the conviction on October 22, 2002. 301 A.D.2d 119. Leave to appeal to the New York Court of Appeals was denied on March 10, 2003, by the Honorable Richard C. Wesley. 99 N.Y.2d 626. Petitioner sought certiorari from the United States

Supreme Court, but his petition was denied oh October 6, 2003. 540 U.S. 821.

After Petitioner's direct appeal was concluded, he moved in the trial court to set aside the judgment on the theory that trial counsel had rendered him ineffective assistance. On September 6, 2005, Petitioner's motion was denied by the Honorable Ruth Pickholz. (Pet. Appendix, Ex. A "PApp: A"). Leave to appeal Justice Pickholz's decision was denied on January 12, 2006, by the Honorable Joseph Sullivan of the Appellate Division. No. M-5835, 2006 N.Y.App. Div. LEXIS 405. Petitioner then filed a petition for a writ of error coram nobis in the Appellate Division, contending that his appellate counsel had tendered him ineffective assistance. The petition was denied on March 9, 2006. No. M-6505, 2006 N.Y.App. Div. LEXIS 2772 (N.Y.App.Div. Mar. 9, 2006). Leave to appeal that decision to the New York Court of Appeals was denied on May 30, 2006, by the Honorable Victoria Graffeo. 6 N.Y.3d 892.

The application for a writ of habeas corpus was filed in this Court on March 17, 2006. Bierenbaum has alleged that trial counsel and appellate counsel both accorded him ineffective assistance, in violation of the Sixth Amendment of the United States Constitution and that the admission of hearsay statements violated his right to confront witnesses under that same Amendment. The State has answered the Petition, argument was heard, and the issues were considered fully submitted on October 23, 2006.

On July 7, 2006, Bierenbaum filed a motion for an evidentiary hearing, which was denied on March 7, 2007.

*2 On March 19, 2007, Bierenbaum filed a motion for reconsideration of the Court's denial of his motion for an evidentiary hearing. The motion for reconsideration was terminated for incorrect filing, and Bierenbaum re-filed the motion on July 31, 2007.

The Evidence at Trial

Petitioner married Katz in August, 1982 (A. Katz: 2438; Doucet: 2652; M. Bierenbaum: 2072).FN1 Petitioner had graduated from medical school in 1978, and soon after the wedding he became a resident surgeon at Maimonides Medical Center in Brooklyn (Doucet: 2651; Stipulation: 3006-07). Katz was 26 years old when she married Petitioner (A. Katz: 2431). She was then a psychology major at Hunter College and did odd household jobs on the side; thereafter she became a Ph.D. candidate at Long Island University and a research assistant at Beth Israel (McCollough: 2032; Beale: 2172-73; DeCesare: 2214, 2220-21). Petitioner and Katz ultimately moved into an apartment at 185 East 85th Street in Manhattan (M. Bierenbaum: 2072; A. Katz: 2437).

Katz told her acquaintances that Petitioner was "difficult" (Beale: 2173-74) and "controlling" (Kasenbaum: 2139), and that he fought with her (McCullough: 2036). She told her close friend Maryann DeCesare ("DeCesare") that there was "fighting," that she was afraid of Petitioner's "bad temper," and that Petitioner threatened to strangle her (DeCesare: 2215-17, 2218). Over the years, Katz

FN1. Parenthetical references in this section are to

pages of the trial record and names of witnesses giving testimony

also informed her analyst, Dr. Sybil Baran ("Dr.Baran"), that she was "extremely anxious" about staying with Petitioner, and "extremely afraid" of the arbitrary eruptions of his anger, that Petitioner would become "enraged" if Katz smoked (Baran: 2635) and that Katz was "extremely afraid" that she would not be financially self-sufficient should she leave Petitioner (Baran: 2634-35).

Before the wedding, Petitioner's best man, Edward Doucet ("Doucet"), had observed the two arguing (Doucet: 2653-54). Thereafter, Petitioner advised Doucet that he was "frustrated" and "angry" in his marriage, and that he "argued" with Katz (Doucet: 2655). Similarly, Petitioner admitted to his hometown friend Scott Baranoff that his marriage was "in turmoil" and that he and Katz argued over Petitioner's "time and money" (Baranoff: 2872-74), 2875-76). These disputes involved "yelling and screaming" and became more frequent as time passed (Baranoff: 2876, 2877). Petitioner told his father that he and Katz were having trouble "adjusting" to each other (M. Bierenbaum: 2075).

Katz later reported to her cousin, Hilliard Wiese, that on a fall day in 1983 she was studying for her GREs while Petitioner was out, was nervous, and smoked a cigarette on the apartment balcony. Later that day or on the next, she called Wiese and sought his advice. In a hushed and "extremely upset" tone, Katz reported that Petitioner had attacked her and choked her to unconsciousness. This was not the first time Petitioner had choked her, but it was the first time

she had passed out (Wiese: 1902-03, 1905-09). Pursuant to Wiese's advice, Katz left the apartment and stayed with her grandfather for at least a month (Wiese: 1910-12; A. Katz: 2444-45).

*3 At about the same time, Katz called her sister, Alayne Katz ("A. Katz" or "Alayne"), "hysterical" and "extremely upset" (A. Katz: 2440). Katz had reported that, "less than a day" before, Petitioner had strangled her. Katz lost consciousness, Petitioner revived her, and he apologized. Katz added that she was unsure what to do (A. Katz: 2440, 2441). On November 12, 1983, Katz filed a complaint against Petitioner at the 19th precinct (Nuhic: 2055-59; P.Ex. 2). Thereafter, Katz's employer, Leigh McCullough, noted bruise marks on Katz's neck that resembled "fingers" (McCullough: 2032, 2034, 2035-36). Katz explained to McCullough that Petitioner had caught her smoking, had become angry, and had choked her (McCullough: 2035). Katz made similar reports to her friends, Denise Kasenbaum ("Kasenbaum"), and DeCesare, and also to Dr. Baran (Kasenbaum: 2140; DeCesare: 2218-19; Baran: 2636). The incident in fact became a "theme" in Katz's sessions with Dr. Baran and at times, because of her mental "conflict" about her marriage, Katz "minimized" the incident (Baran: 2636, 2643).

At around this time, Katz had a "very exquisite" telephone conversation with her former employer, Francesca Beale ("Beale"). In that conversation, Katz stated that she was in fear of Petitioner and asked whether she could move in with Beale and her husband (Beale: 2174). For his part, Petitioner stated to his father at some point in 1983 that he had argued with his wife and that he had "physical contact" with

her (M. Bierenbaum: 2075).

Katz considered leaving the marriage and frequently discussed that subject with her sister Alayne, and once asked if Alayne's boyfriend could rent her an apartment (A. Katz: 2443-44). On April 3, 1984, Katz consulted matrimonial attorney, Betty Levinson ("Levinson") (Levinson: 2753-54), paying Levinson with a check drawn on a joint account with Petitioner (Levinson: 2755-57). However, Katz did not attend a second, scheduled meeting with Levinson in August, 1984 (Levinson: 2754-55), and resumed her relationship with Petitioner perhaps as a result of financial considerations concerning Katz' graduate studies, or the pleading of Petitioner's parents (Wiese: 1913; McCullough: 2037-38; M. Bierenbaum: 2094-95; DeCesare: 2223; A. Katz: 2445-46).

Katz repeatedly asked DeCesare whether DeCesare would abandon her husband had he threatened to strangle her should she leave, and told DeCesare that Petitioner had in fact threatened to kill her if she left him (DeCesare: 2221-23, 2224). Katz reported that once, as they watched a movie on television about Claus von Bulow, Petitioner remarked that von Bulow's problem was that he left evidence. Petitioner said that he would not leave evidence (DeCesare: 2223, 2241).

After the 1983 strangulation incident, Katz and Petitioner consulted therapists (McCullough: 2038; M. Bierenbaum: 2094-95; Baranoff: 2876-77). At one point, Petitioner told Doucet that he hoped a therapist could keep his marriage intact (Doucet: 2656). FN2

FN2. Doucet was not certain of the timing of his

conversation with Petitioner, but the reference to Petitioner's therapy suggests that it was after the choking incident (Doucet: 2658-60)

Over the course of the marriage, Katz also spoke to Doucet on occasion and advised Doucet, up until the last time she saw him in the winter of 1984-85, that she was "upset" and frightened about "potential violence" at Petitioner's hands (Doucet: 2656-57). At about the same time, Doucet ran into Petitioner on the street. Petitioner told Doucet that he was so upset with Katz that he could kill her (Doucet: 2657-59).

*4 In September of 1984, Katz enrolled in graduate school at Long Island University, where she became close friends with fellow student Ellen Schwartz ("Schwartz") (Schwartz: 2665-67). Katz told Schwartz that she was very unhappy in her marriage and was thinking of leaving Petitioner, at least in part because she was afraid of him (Schwartz: 2667-68). She noted in particular an occasion on which Petitioner strangled her upon discovering that she was smoking while preparing for exams (Schwartz: 2668). Another friend with whom Katz discussed the choking incident was Dr. Yvette Feis ("Dr.Feis"), an academic supervisor who became a friend and confidante as well (Feis: 2384-88, 2409-10). Katz also reported to Dr. Feis that she avoided sex with Petitioner, to the point of going to bed with her clothes on (Feis: 2386-97).

During the summer of 1984, Katz had become involved in a sexual affair with an investment manager named Anthony Segalas ("Segalas"). On one occasion, she arranged a rendezvous in her apartment, while Petitioner was absent (Segalas:

2346, 2349-50, 2351-54, 2358, 2375-76; Feis: 2410; Baran: 2643). Katz told Segalas that she was "trapped" in her marriage, unhappy, and afraid (Segalas: 2354-56, 2361-62, 2374, 2378, 2379-80). Perhaps twice, they shared "very small" amounts of cocaine, about which Katz seemed "naïve" (Segalas: 2358-61, 2363-64). However, the affair was intermittent, and the two did not see each other much as 1984 turned to 1985 (Segalas: 2356-58, 2361).

In 1985, Katz occasionally told friends that things with Petitioner were "better" (Segalas: 2361-62; Feis: 2409). In February of 1985, however, Katz met a psychologist named Kenneth Feiner ("Feiner") on the subway, and they became close friends (Feiner: 2323-24, 2341-42; Feis: 2409; Baran: 2643). The two saw each other about seven times from February to July, but did not have sexual relations (Feiner: 2325-26, 235-40). Katz told Feiner that she was "deeply unhappy" and wished to leave Petitioner, that Petitioner had placed his hand on her neck, and that they constantly argued (Feiner: 2327, 2340, 2342).

Around the beginning of 1985, Katz separately told Alayne and Dr. Feis about a letter that she meant to use to help her free herself from Petitioner. That letter, addressed to Katz by Petitioner's psychiatrist, warned that Katz was in danger from Petitioner and advised her to separate from him (Feis: 2388, 2392-93; A. Katz: 2442). Katz considered the letter to be "leverage" for divorce proceedings. She intended, should she not obtain satisfaction in those proceedings, to use the letter to "ruin Petitioner's career" (Feis: 2393). Katz told Dr. McCullough that, to obtain a divorce from Petitioner, she would threaten to expose allegations that he and his father had

committed a multi-million dollar Medicare fraud (McCullough: 2040-41).

In late 1984 or the first half of 1985, Petitioner's co-worker at Maimonides, Nurse Educator Karen Caruana ("Caruana"), heard Petitioner on the telephone arguing "very loudly" with Katz (Caruana: 2254-55, 2260-61). Throughout 1985, Katz told Dr. Baran that she was looking for an apartment, had a financial "guarantor"; and seemed to be "landing on the side of leaving" Petitioner (Baran: 2639, 2641). In the early summer, Petitioner and Katz purchased a "half-share" in a summer house in the Hamptons owned by Dolores Ericksen and her husband. Katz told Ericksen that she was "very unhappy," could not stand being without money, and wanted a divorce from Petitioner. Katz added that she could not wait all the time it would take for Petitioner to become a financial success (Ericksen: 2295, 2300-01).

*5 In the weeks leading up to July, 1985, Katz told her sister Alayne that she was "ready to leave." She told her sister that she had informed Petitioner of her intent to use his psychiatrist's letter if he did not agree to a favorable financial settlement (A. Katz: 2446-48). Just after the beginning of July, Katz reported to DeCesare that she had "met someone else," a "psychologist at Downstate" named "Ken Feiner." She "was very happy" and "in love," and planned to ask Petitioner for a divorce (DeCesare: 2224-25, 2229). Katz added that she had obtained a "loan" that Petitioner knew nothing about, and therefore was "financially" able to leave him (DeCesare: 2228-29). Around the 4th of July, Katz advised Schwartz that it was "imminent she was going to tell" Petitioner she was leaving; Schwartz

"kind of" thought Petitioner was to get the news over the next weekends (Schwartz: 2668-69). As Katz was still "very concerned" about her finances, Schwartz offered to let Katz move in with her in Connecticut (Schwartz: 2669).

The last time Kenneth Feiner saw Katz was on July 4th. That night they had dinner and "kiss[ed] and a little more" at his apartment before she left in a cab (Feiner: 2325-26, 2330-31, 2335). That evening or shortly before, Katz told Feiner that Schwartz had offered her a place to stay, rent-free, and that she now felt financially able to leave Petitioner (Feiner: 2327-29). Katz and Feiner agreed to meet on July 13th, when they would both be in the Hamptons (Feiner: 2334).

Katz visited her regular gynecologist, Dr. Mary Wilson ("Dr.Wilson"), on July 6th, "probably" before 1:00 p.m. (M. Wilson: 2155, 2158, 2160-61). Katz had obtained a replacement intra-uterine device on June 21st, and was back on July 6th for a follow-up check that proved routine (M. Wilson: 2156-59). Katz was in a "quite jovial" mood (M. Wilson: 2158-59; I. Wilson: 2164-65). When the examination was complete, she made an appointment for December and told the doctor's husband, "see you in six months" (M. Wilson: 2159-60; I. Wilson: 2162-65).

Kasenbaum last saw Katz on July 6th, in the afternoon. Katz said she was "definitely going to leave him" that weekend, and was looking for an apartment (Kasenbaum: 2143-45, 2148-50). Katz was carrying a newspaper with circled apartment listings (Kasenbaum: 2145). Katz reported that she wanted to keep seeing a man with whom she was having an

"affair" (Kasenbaum: 2145-46).

Segalas also saw Katz for the last time on July 6th, in a chance encounter on the street (Segalas: 2362-66). Katz seemed excited about work and to be doing well, and talked about moving in with a girlfriend in Connecticut (Segalas: 2362, 2365-66). When Segalas got home, there were "hang ups" on his answering machine. Thinking that Katz might have called, he telephoned her apartment, but Katz told Segalas in a "very brief" conversation that she had not called. Segalas received the impression that someone was with her during their conversation (Segalas: 2366-68).

*6 Around the end of June, 1985, Katz had completed a paper on depression and suicide. Years before, she had once attempted suicide herself (DeCesare: 2225, 2233, 2239-40; Segalas: 2355; Baran: 2647). However, Katz gave those who knew her, including her therapist, no reason at all to consider her suicidal during early July, 1985 (Feiner: 2330; Feis: 2404-05; A. Katz: 2448; Baran: 2637-38, 2646). She told Feiner that she was to see her first patient in the week of July 8th, and she was very excited about that (Feiner: 2329, 2334). Dr. Baran noticed that Katz had recently received a pedicure and observed, "[n]o suicidal person has a pedicure" (Baran: 2638). Alayne Katz remembered that, even as Katz was looking to move out, she was planning a party for Petitioner's 30th birthday and that that was typical of Katz; she complained "bitterly" of her problems, but she was always hopeful that difficulties would be resolved in the future (A. Katz: 2449-50).

Petitioner had been very close friends with Scott Baranoff ("Baranoff") and attorney David Ostrow

("Ostrow") in their hometown of West Orange, New Jersey (Ostrow: 2832-35, 2837; Baranoff: 2872-74, 2881). The three had a "reunion" at Baranoff's house on July 3, 1985, when Ostrow visited from Baltimore, and Baranoff came home from Houston (Ostrow: 2836-39; Baranoff: 2877-78, 2881-82). Ostrow called Petitioner on July 5th, with Baranoff listening, and urged Petitioner to come see them again (Ostrow: 2839-40; Baranoff: 2881-82). Petitioner replied that he could not, as he and Katz had plans for dinner and movie on July 6th. Ostrow showed "no sympathy" for Petitioner and began to "bust [Petitioner's] balls," "cajoling" and "berating" Petitioner as length (Ostrow: 2840-42; Baranoff): 2886). In the background, Ostrow could hear what he believed was Katz's voice "screeching" and "henpecking" Petitioner about their "date", and Petitioner persisted in refusing to meet his friends, even when they offered to travel to Manhattan, even when Ostrow accused Petitioner of being "pussy whipped" (Ostrow: 2842-43). Ostrow left West Orange on Sunday, July 7th, at 4:00 or 5:00 p.m. without seeing Petitioner again (Ostrow: 2843).

Caldwell Airport ("Caldwell"), also known as the Essex County Airport, was only a 20 minute drive from the Baranoff residence (C. McKenna: 2467; Barahoff: 2880). Petitioner, a licensed pilot, routinely rented airplanes at Caldwell, from McDan Aircraft Rental ("McDan") (M. Bierenbaum: 2080-82; C. McKenna: 2511). On July 7, 1985, Petitioner rented a Cessna 172 from Mrs. Joan McKenna of McDan, for a period beginning at 4:30 p.m., during which the plan's engine was engaged for one hour and 56 minutes, a period long enough for the Petitioner to fly well over the Atlantic Ocean and then back to the airport (C. McKenna: 2474-89, 2491, 2505-06, 2511, 2514-15;

Foresto: 2529-51). Petitioner's rental period ended at 7:30 p.m., apparently having been extended by Petitioner past the 6:00 p.m. conclusion that was initially intended (C. McKenna: 2483-84). It would have been possible for Petitioner to have driven his car directly to the plane, and loaded luggage onto it, without coming into line of sight of the McDan office (C. McKenna: 2490-91, 2501-03, 2512).

*7 The evening of July 7th, 1985, Petitioner attended a birthday party for his nephew in Upper Montclair, New Jersey at which Petitioner's father, Marvin Bierenbaum, was present, arriving at about 6:30 p.m. without Katz, though she was expected (M. Bierenbaum: 2067-68, 2076-77, 2079, 2103-04; A. Katz: 2448-49). Petitioner explained that Katz had "gone out earlier in the day" and had not returned to come to the party with him (M. Bierenbaum: 2077-78). When the elder Bierenbaum left at about 8:30 p.m. Petitioner was still at the party. He was sleeping on a couch (M. Bierenbaum: 2079-80).

At about 9:00 p.m., Baranoff returned to his parents' home from dinner and, to his surprise, found Petitioner there (Baranoff: 2879). Petitioner now appeared "distraught," and reported that he and Katz had argued that morning and as Baranoff recounted it at trial, Petitioner said that "she had left the house, dressed in shorts and halter top and sandals. Either he had said she was going to the park or she was headed to the park. And she had not yet returned" (Baranoff: 2879). Petitioner added that he was worried, and he called his apartment "a couple of times" from the Baranoff household (Baranoff: 2879). Although Petitioner mentioned that he had just been to visit his family, he did not tell Baranoff that he had

flown an airplane from nearby Caldwell Airport that afternoon (Baranoff: 2879-80). During a number of conversations that Baranoff later had with Petitioner about July 7, 1985, Petitioner never mentioned that he had flown that day (Baranoff: 2780-81).

At about 11:45 p.m. on July 7th, Petitioner left a message for Dr. Feis, and the two spoke shortly thereafter (Feis: 2393-94, 2410-11). Petitioner told Dr. Feis that Katz was missing. He stated

that in the morning he and Gail had an Argument and that she left the apartment to go to Central Park. He told me that she never returned. He went to a family party in New Jersey and when he came back she was still missing so he was calling me to find out if I knew where she was

(Feis: 2394). Dr. Feis stayed in very frequent contact with Petitioner in the days that followed arid either in this first conversation or almost immediately thereafter, began persistently to urge Petitioner to take the matter seriously and contact the police (Feis: 2395-98, 2411-13). During their conversations, Dr. Feis also urged Petitioner to hire an investigator, and was "surprised" when she learned that he hired a lawyer first (Feis: 2412-13). Neither when they initially spoke, nor on the "many, many times" in later days that Dr. Feis asked Petitioner about "what he did, what [Katz] did" on July 7th, did Petitioner tell Dr. Feis that he had flown a plane that day (Feis: 2394).

Katz did not appear for her noon appointment with Dr. Baran on Monday, July 8th. At 12:10 p.m., Petitioner called Dr. Baran and asked whether Katz

was with her. Petitioner added that he and Katz had argued and that she had gone off "in a huff" (Baran: 2638). That same day, Petitioner called Katz's mother who advised Alayne Katz of Petitioner's report that Katz had not come home on Sunday night (A. Katz: 2452). Also on that day, Petitioner called Kenneth Feiner to ask if he had seen Katz (Feiner: 2332-33) and to Feiner, Petitioner's voice seemed "flat" and "stilted" (Feiner: 2333).

*8 On July 8th, Petitioner called Schwartz who told Petitioner that Katz was not with her and Petitioner then advised Schwartz that he had spoken to Dr. Baran and that Dr. Baran had said Katz was "very depressed," and that Katz might "do something to hurt herself", and Petitioner added that Katz "had asked [him] for a divorce" (Schwartz: 2670-71; O'Malley: 2703-06). According to Dr. Feis, Petitioner "didn't seem very interested" in her suggestions about concrete steps to find Katz, in particular that; he speak to the doormen at his apartment building (Feis: 2395-98). Dr. Feis felt it necessary on her own to call the morgue, the police, and the press (Feis: 2398).

Petitioner appeared at the 19th precinct at about 9:00 p.m. on July 8, 1985 and filled out a missing person report indicating that, when he last saw Katz, she had been wearing pink shorts, a white t-shirt, and "some engagement rings" (Dalsass: 1933-34, 1939). Beginning at about 9:30 p.m., Petitioner spoke for about forty-five minutes with Detective Virgilio Dalsass ("Dalsass") of the precinct's Missing Person Squad (Dalsass: 1934-36) and related that he and Katz had had an argument on the morning of July 7th, that she had gone to Central Park at about 11:00 a.m. to "get some sun" and never returned (Dalsass:

1936-37, 1988-89). Petitioner specified that he had remained home until 5:30 p.m., and in the intervening period, had received several telephone calls and at 5:30 p.m., went to his parents' house (Dalsass: 1936). Petitioner further advised the detective that Katz had tried to commit suicide in the past, and that she had been hospitalized (Dalsass: 1941). Petitioner did not mention that he was a pilot and when recounting the details of his actions on July 7th, did not say that he had flown a plane that day (Dalsass: 1942).

Detective Dalsass asked Petitioner for information about friends and relatives who might know where Katz was, stating that such information would be "very beneficial" in locating Katz, and Petitioner responded that he had dinner plans and that he would address those subjects from home later that night (Dalsass: 1941-42, 1962-63). Detective Dalsass called from home later that night (Dalsass: 1941-42, 1962-63). Detective Dalsass called Petitioner at about 12:30 a.m. on July 9th, but was obliged to leave a message on Petitioner's answering machine and from then until July 14th, the detective left half a dozen or more additional messages for Petitioner, but did not receive a reply (Dalsass: 1942-43). After the interview on July 8th, uniformed officers searched the blocks around Petitioner's apartment, and the area from Petitioner's apartment to Central Park, with negative results (Dalsass: 1966).

On Wednesday, July 10th, Detective Thomas O'Malley ("O'Malley") of the police department's central Missing Person Squad talked to Petitioner by telephone, when Petitioner called to offer assistance to the investigation (O'Malley: 2685-97). Petitioner stated that he and Katz had argued, and that she left

to go to Central Park (O'Malley: 2723). The detective asked whether anyone had seen Katz leave "that day," and Petitioner reported that "the doorman Edgar had told [Petitioner] that he had seen [Katz] shortly after eleven o'clock" on July 7th (O'Malley: 2687-88, 2692). However, Edgar Rivera, the only doorman on duty at Petitioner's building on the 7:00 a.m. to 3:00 p.m. shift on July 7th, recalled seeing Katz on Saturday, July 6th, but not on Sunday, July 7th (Rivera: 2593-94; Lienau: 2602-05). On July 10th, Petitioner called Segalas, who offered his help in locating Katz; Petitioner did not ask Segalas who he was because, as Segalas put it at trial, "[h]e knew who I was" (Segalas: 2369-70).

*9 In the "middle of the week," Petitioner reported Katz's disappearance to Doucet and told him that "he had not seen her since" (Doucet: 2660-61). Petitioner added that he thought Katz had been "seeing someone" but did not mentioned that he flew a plane on July 8th (Doucet: 2362). About the same time, Caruana noted that Petitioner had appeared for work at Maimonides Medical Center unshaven and looking "very disheveled," as if he had not slept (Caruana: 2261). Petitioner advised Caruana and other Maimonides employees that his wife was missing (Caruana: 2261-62).

Petitioner spoke to Detective O'Malley again on July 13th when he was escorted to the detective's office by Katz's parents (O'Malley: 2688-89, 2726-27). The detective asked Petitioner to relate the events of July 7th as completely as possible (O'Malley: 2689, 2695-95) and Petitioner reported that, on Saturday the 6th, he and Katz had a "mild" dispute, that on Sunday the dispute "continued" until Katz left for Central Park at

about 11:00 a.m. to "cool off' (O'Malley: 2689). Petitioner did not mention that Katz took anything with her (O'Malley: 2701). Petitioner reported that he thereafter "hung around" the apartment, that Katz never returned, that he went to his sister's house in New Jersey, left that house at 8:00 or 9:00 p.m. to visit his friend Scott, checked his home telephone for messages, and ultimately returned home at about 11:00 or 11:30 p.m. (O'Malley: 2689-90, 2723-24). Before going to bed, Petitioner called Katz's mother, her friend "Deborah," and Schwartz, but learned nothing of Katz's whereabouts (O'Malley: 2690-91). Petitioner added that he reported Katz's disappearance to the police only at 9:30 p.m. on July 8th, after he was urged to do so by "friends," because he had believed that she would return (O'Malley 2691). In the course of his narrative, Petitioner did not mention the New Jersey flight (O'Malley: 2695, 2699) and did not indicate that he left his apartment before he went to his sister's house that day (O'Malley: 2700).

During this conversation with Petitioner, Detective O'Malley also asked about the doorman's supposed sighting of Katz at 11:00 a.m. on July 7th, which Petitioner had reported in their telephone interview on July 10th. Petitioner advised the detective that he had spoken again to Edgar, and that "Edgar now thinks it may have been some other day .... [H]e believes it was another day" (O'Malley: 2691-92). Petitioner told the detective that his marriage "was going pretty bad, it was terrible," that he and Katz were "always having fights," and that they were in therapy (O'Malley: 2692, 2724-25). Petitioner denied that he had ever hit his wife and when Detective O'Malley asked if he had strangled her to

unconsciousness, Petitioner "very abruptly" answered "no, I don't want to speak about that" (O'Malley: 2692-93). Petitioner did report that Katz was "depressed" and "suicidal" and said nothing about the possibility that she was killed by drug dealers, or was alive in California (O'Malley: 2696, 2698-99). At the end of the interview, Petitioner said, "this [doesn't] look right. People are going to start to wonder." Upon the detective's request for clarification, Petitioner noted, "it is obvious, isn't it?" (O'Malley: 2724-25).

*10 On July 14, 1985, a week to the day after Katz disappeared, her relatives and friends met at Petitioner's apartment and spent hours in the area between Petitioner's apartment and Central Park, posting notices and inquiring whether anyone had seen Katz the previous Sunday, and the answers all were negative (DeCesare: 2229-2234; Feis: 2399-2400; Segalas: 2372; A. Katz: 2452-54). During the canvass, Petitioner's father "was doing most of the direction" (DeCesare: 2230). DeCesare asked Petitioner where he thought Katz might be and he answered that he "thought she was on a shopping spree at Bloomingdale's" and that "you know what a JAP she was" (DeCesare: 2232).FN3 Petitioner also told DeCesare that "they had a fight and she walked out," that he wondered why she "went out without her shoes on," and that she had not had her rings on (DeCesare: 2232-33).

Near the Central Park reservoir, Petitioner reminded DeCesare that Katz had been working on a paper about depression, had tried to commit suicide when working on this paper and ... that she didn't kill herself" (DeCesare: 2233). Petitioner "got angry" and

FN3. DeCesare explained for the jury that a "JAP" is a "Jewish American Princess" (DeCesare: 2232).

continued, "how do [you] know that [Katz] hadn't climbed the gate. How [do you] know she didn't climb the gate of that reservoir. How do [you] know ... she wasn't lying at the bottom of that reservoir, that she didn't climb the gate and jump into the reservoir" (DeCesare: 2234).FN4

Dr. Feis was another volunteer who canvassed the neighborhood on July 14th (Feis: 2399-2400); while back at Petitioner's apartment, Dr. Feis listened as someone asked what had happened to the large area rug that had previously been in the living room; Petitioner answered that the rug had been sent out for cleaning and when challenged about how he had time for such matters with his wife missing, Petitioner specified that the cat had messed on the rug (DeCesare: 2234-35; Feis: 2400-01). Dr. Feis asked why Petitioner though Katz had gone to Central Park, and he replied that she had taken "something" to lie down on, "like when she would go to the park to sunbathe" (Feis: 2402).

Although Petitioner did not respond to telephone messages from Detective Dalsass after their initial discussion of Katz's disappearance (Dalsass: 1943), and the detective was left "rather frustrated," from Katz's family he learned of efforts being made to find her; through Alayne Katz, Detective Dalsass arranged

FN4. DeCesare occasionally spoke to Petitioner again during the following months about the search for

Katz. Petitioner always made "references to the water," such as that he thought she might be "waitressing by a seaside community" or "cooling off" (DeCesare: 2235-36).
to meet Petitioner at 4:00 p.m. on July 14th, after the canvassing session's completion (Dalsass: 1943-46). Accompanying Petitioner were his father and Katz's parents (Dalsass: 1944-46).

Detective Dalsass began the meeting by emphasizing that even "insignificant" details could be critical in locating Katz (Dalsass: 1947) and he asked Petitioner to narrate where he and Katz had been in the days before her disappearance, and urged him not to omit anything (Dalsass: 1947-48). In response, Petitioner described what he and Katz did on Friday and Saturday, July 5th and 6th, mentioned Katz's gynecology and hairdressing appointments, and some shopping the two of them did at a bagel store, a lingerie shop, and a pet food establishment and added that he and Katz had argued during these errands and thereafter, but refused to explain the argument (Dalsass: 1950-53). Petitioner noted as well that he and Katz had "a couple of steaks" for dinner on July 6th, that Katz arose at about 9:30 a.m. on July 7th, that she declined to have breakfast, and that she spoke on the telephone to Beale about Beale's desire to consult a surgeon and then, saying that she wished to get some "sun in the park" behind "the museum," Katz left at about 11:00 a.m. (Dalsass: 1954), wearing pink shorts and a white t-shirt, and "possibly" took a towel with her (Dalsass: 1955).

*11 Petitioner said that he stayed in his apartment until 5:30 p.m. on the 7th, taking telephone calls there, including one from "Debra" concerning a dinner

party that Petitioner had missed the previous evening and that he was "positive" that he left his apartment at 5:30 p.m. to go to a birthday party in West Orange, New Jersey but Petitioner did not mention that he was a pilot, or that he flew a McDan Aviation plane on July 7th (Dalsass: 1955-158, 1964).

Petitioner told Detective Dalsass that he was at that family birthday party from about 6:30 to 10:30 p.m. (Dalsass: 1955-58, 1963) and that after a brief stop at the house of his friend Scott, he returned home at about 11:30 p.m. on July 7th, called Katz's mother and Schwartz, and then retired for the night (Dalsass: 195-597-58) and that on July 8th, he went to work and reported his wife's disappearance at the 19th precinct at about 9:00 p.m. (Dalsass: 1959).

Despite all the detail, Detective Dalsass felt "frustration" when he made follow-up inquiries of Petitioner (Dalsass: 1960-62). When the detective asked about the name of the bagel store or the pet food establishment, Petitioner would answer that he did not know, or that he would reveal that information "later" (Dalsass: 1961-62). Although Petitioner said he would be home after he had dinner with his father, when the detective called at 12:30 a.m. on July 15th he reached only Petitioner's answering machine (Dalsass: 1962-63).

Based on information from Alayne Katz, Detective Dalsass spoke to Anthony Segalas on July 16, 1985, and to Kenneth Feiner on July 19, 1985; both were cooperative, and neither hesitated to provide information (Dalsass: 1971-74).

At some point during July, 1985, Detective Dalsass

asked to look around Petitioner's apartment and Petitioner said that he would get back to the detective (Dalsass: 1977, 1998-99). On September 12, 1985, Petitioner and his attorney, Scott Greenfield ("Greenfield"), met Detectives Dalsass and O'Malley at Greenfield's office, and Petitioner agreed that the police could enter the apartment (Dalsass: 1975-77, 1999-2000). On September 30th, when Detective Dalsass and members of the Crime Scene Unit arrived at Petitioner's apartment, Greenfield limited what they could do: the officers were permitted to look only for samples of Katz's fingerprints, and for a diary and address book and could not, as they had intended, search for blood and hair, examine rugs, check for fresh paint, and otherwise explore whether a crime occurred in the apartment (Dalsass: 1978-80). Petitioner's private investigator was present, and when Detective Dalsass used the bathroom, that investigator shadowed the detective as far as the bathroom door (Dalsass: 1980).

In the ensuing weeks, Dr. Feis spoke with Petitioner daily "or even more" (Feis: 2403-04). Petitioner told the doctor that he thought it was possible that Katz committed suicide, or that she "just went off" (Feis: 2404). During one of their conversations, however, Petitioner conceded that the argument he had with Katz on the morning of July 7th was "more severe than he had told people before (Feis: 2405-06). According to Petitioner, despite advice he had had from a psychiatrist, "this time" he "did not defuse the situation" and the argument became "explosive" (Feis: 2406-07).

*12 In October, 1985, Alayne Katz, accompanied by her boyfriend, went to Petitioner's apartment in hopes

of retrieving Katz's belongings. A "terrible" scene ensued. There were "trash bags all over the place with all of her things thrown in it" (A. Katz: 2454-55). Among these items were "her clothes, her personal papers, she wrote poetry, her letters ... photographs ... toiletries ...." (A. Katz: 2459). The Petitioner would not give Alayne Katz items she particularly wished to take: Katz's "bicycle ... skis, certain jewelry and then there was a crystal dish my aunt had given ... we had a fight at that point" (A. Katz: 2455). In that "fight," Alayne Katz "yelled at [Petitioner] that he killed my sister and he can't have her things" (A. Katz: 2455). Petitioner denied the accusation and added that Katz "was a tramp" and was "off living with someone else" (A. Katz: 2455).

In the months before and after that conversation, Alayne Katz sent letters seeking information to the 500 or so people in Petitioner's building, to all the doctors in the hospitals where Petitioner was a resident, and to "all of [Katz's] friends" (A. Katz: 2455-57). No one reported seeing Katz after July 7, 1985 (A. Katz: 2457).

In the meantime, in July, Petitioner had resumed his visits to the Hamptons "share" house which he and Katz had joined and advised his housemate Susan D'Andrea ("D'Andrea") that Katz was "missing" and related

that they had gotten in a fight and that she had taken a towel and some suntan lotion and had gone to Central Park. She wanted to cool off and he waited a couple of hours and then he went looking for her and he found the towel and the suntan lotion but she was gone ....

(D'Andrea: 2282-83).
At trial, D'Andrea added "That is very clear in my mind" and when D'Andrea asked Petitioner what he thought had happened to his wife, he "just looked at me" (D'Andrea: 2283). D'Andrea continued, "do you think maybe someone kidnapped her," and Petitioner "just shrugged his shoulders" (D'Andrea: 2283). Petitioner said, "I don't know. I don't know" (D'Andrea: 2284). It was "matter of factly. He wasn't upset. He was just very low keyed ..." (D'Andrea: 2284). D'Andrea recalled that Petitioner kept coming to the "share" house during the remainder of the summer and once announced that he would be distributing "missing persons posters," but D'Andrea never saw any (D'Andrea: 2285-86). In those months, Petitioner was "going out" in the Hamptons (D'Andrea: 2286, 2292-93). During cross-examination, at least as recorded in the transcript, D'Andrea made various statements to the effect that after July 7, 1985, Petitioner was, or was not, "upset," "dull," "somber," or "dazed."

The house "landlady," Dolores Ericksen, heard from Petitioner by telephone on one of "his" July weekends and Petitioner said that he and Katz had fought, and that he was coming out alone (Ericksen: 2302). When Petitioner arrived, he confirmed to his housemates

*13 that they had a fight and that she stormed off and went to the park .... [H]e said he tried to look for her. He said that she left in a pair of shorts with a towel and he had gone to look for her .... [H]e went after to see where she was and he asked people where she was and they said they had seen her but not that day....He said she was wearing a pair of shorts and she walked

out with a towel. That's all she had, and some money, just a few dollars .... [L]ike six dollars ....

(Ericksen: 2303-05, 2313-15). When Petitioner was asked what he thought happened to Katz, he added he thought she had a drug problem because he went through her drawers after she left and he found cocaine, and he believed that she might have gone off with drug dealers and disappeared with drug dealers

(Ericksen: 2305, 2310-11).
Petitioner came out to the share house for the remainder of the summer, including a more extended stay on weekdays during the month of August (Ericksen: 2305-06). In the days after Katz's disappearance, Petitioner "seemed to be going out a lot," dressing up and sometimes staying out "very late" (Ericksen: 2306-08). For example, on his first weekend in the Hamptons after Katz disappeared, Petitioner went to a comedy club, where he "seemed to be ... having a good time" (Ericksen: 2309, 2311-12). Yet at the end of the summer, as Petitioner was packing his clothes, he seemed "teary eyed" and Ericksen said to him, "This must be hard for you" to which he replied, "yes it is" (Ericksen: 2312-13, 2315-16, 2317-18).

Petitioner and Caruana, one of his companions in the Hamptons, had dinner at his house on a weekday evening, and began a sexual affair that night (Caruana: 2262-65). The affair continued in Manhattan, and lasted about six weeks (Caruana: 2265, 2266, 2272-73). Then, during dinner in a restaurant, Petitioner "suddenly attacked [Caruana] verbally for something that [she] had said that [she] thought was fairly harmless" (Caruana: 2265-66).

Caruana walked home crying, and did not see Petitioner socially again (Caruana: 2266).

During his relationship with Caruana, Petitioner had not expressed concern for Katz (Caruana: 2272). Petitioner did advise Caruana that when Katz left to "cool off" in Central Park, she left her valuables and her personal belongings in the apartment (Caruana: 2266-67). Petitioner also said that he had hired a private investigator and according to Petitioner, the investigator had "found evidence of [Katz] out in California" (Caruana: 2268). Petitioner opined that, though she did not take her credit cards, Katz was "probably" receiving financial assistance in California from her family (Caruana: 2270-71). Petitioner added that "his apartment and car had been searched" and that he was "clean" as to a police investigation (Caruana: 2268-69). That last statement was "certainly" made before the end of September, 1985 (Caruana: 2269).

In the fall of 1985, Petitioner supervised the work of Roberta Karnofsky ("Karnofsky"), a medical student doing clinical work at Coney Island Hospital (Karnofsky: 2259-61). He began to "flirt" with Karnofsky-for example, "many times" seeing to it that she would be on his side of an operating table and then rubbing up against her during surgery (Karnofsky: 2761-62). They dated, and perhaps in September, 1985, Karnofsky moved into Petitioner's apartment (Karnofsky: 2762). Early in the relationship, Petitioner advised Karnofsky that his wife had "disappeared":

*14 he indicated to me that they had a lot of marital problems and that they had been arguing one Sunday

afternoon, I believe it was, and that they had a particularly bad argument that day and that she was very angry and she stormed out of the apartment and went to cool off in Central Park

(Karnofsky: 2762-63). Petitioner added "that she had been seen one time around the area of Central Park" but then was never seen again (Karnofsky: 2763). Petitioner doubted that Katz would return, and reported that "it was possible she was in some type of a fugue state" (Karnofsky: 2763). Karnofsky explained at trial that a "fugue state" is one caused when "someone has undergone a traumatic event at one time or another" and "they maybe [are] wandering around out in public someplace and they don't know who they are or where they are, kind of a state of confusion" (Karnofsky: 2764).
Petitioner also "once or twice" opined to Caruana that Katz "might have run off with someone," that she had had affairs during the marriage, and that "it was possible she had run off with someone and was living somewhere maybe in the Caribbean" (Karnofsky: 2764). Petitioner advised Karnofsky that the police had "looked in the incinerator" to see "if he threw her body" there, that the police also asked whether Petitioner had the rug taken out and cleaned, and that according to Petitioner, he told them he had not had the rug cleaned (Karnofsky: 2770).

Karnofsky lived in petitioner's apartment for slightly less than a year, until she discovered that he had entertained another woman there (Karnofsky: 2765, 2803-04). While Karnofsky lived with Petitioner, Petitioner emptied out only a couple of drawers for her and accorded her just part of a closet. Katz's many belongings were kept "as if she was living in the

house"; Petitioner refused Karnofsky's requests that he move them (Karnofsky: 2766). He gave only "a small amount" of Katz's belongings to her sister Alayne, and only after making sure that Karnofsky would not be present when Alayne arrived for them (Karnofsky: 2766-067). However, during her year with Petitioner, Karnofsky did not see him make any efforts to find Katz (Karnofsky: 2767). On one occasion, Petitioner received a telephone call at 3:00 a.m. Petitioner asked the caller, "do I need to come down right now?" He then told Karnofsky that "a woman" had been found at a bus terminal and "they wanted him to come down and identify whether or not this was Gail;" Karnofsky asked whether she should pack and leave, but Petitioner reassured her, "don't worry about it. I doubt [that] it is" Katz (Karnofsky: 2767-69). When Petitioner returned, "[a]ll he said was, it wasn't" Katz (Karnofsky: 2770).

During Karnofsky's time with Petitioner, she frequently saw him carrying heavy duffel or flight bags. When he carried one of his bags and one of Karnofsky's, Petitioner would be transporting about 100 pounds, and he seemed to have no difficulty with the weight (Karnofsky: 2771-72, 2816-18). Karnofsky and Petitioner often used an "unmanned" rear exit from Petitioner's building that led to a parking garage; Petitioner kept his car in another garage about two blocks farther away (Karnofsky: 2773-76).

*15 One day, Karnofsky had heard messages on the answering machine "accusing [Petitioner] of murder," apparently messages from Katz's mother and during dinner at a restaurant that evening, after Petitioner and Karnofsky themselves had had a "minor disagreement," she posited to Petitioner how he might

have gotten rid of Katz:

I think that if you did this and if it really happened as some people seem to think it did, that perhaps something happened in the apartment and you intentionally or unintentionally-[Katz] was hurt, you could have put her in one of those big flight bags or duffel bags and carried her out of the apartment since she was very small, put her in the back of your car, driven out to the airport and thrown her body out of the plane

(Karnofsky: 2778, 2810). Karnofsky was "a little bit angry" and not "joking" at this point, but Petitioner just looked at her and gave "[e]ssentially no reaction" (Karnofsky: 2780, 2808-09).

During the latter part of Karnofsky's year with Petitioner, Sharon Alongi ("Alongi"), her friend and classmate, stayed at Petitioner's apartment (Karnofsky: 2779-80). On one occasion when Petitioner was not present, Karnofsky presented her theory to Alongi, and the latter asked to see Petitioner's flight log (Karnofsky: 2781). They located the log and

observed that there was an entry in the flight log that appeared to be-initially appeared to be dated 8/7/95 but it was quite apparent that the date of the entry had been changed from the-underneath original entry was clearly to us having been written to be 7/7/85

(Karnofsky: 2782-83, 2794-95; P.Ex. 19).

Dr. Stephanie Youngblood ("Dr.Youngblood"), a chiropractor, met Petitioner on New Year's Eve at the beginning of 1989 and he and she then lived together in Las Vegas, Nevada for two-and-a-half to three

years, beginning about March 1989 (Youngblood: 2287-90). Petitioner initially told Dr. Youngblood that he had never been married, but she saw Katz's name on bank statements and luggage tags, and eventually asked him who "Gail Bierenbaum" was (Youngblood: 2890). Petitioner was "upset" and "a little bit teary eyed," and it "took him a little while to answer" and then said he had been married, that one day his wife "left the apartment" after a fight to go to Central Park, and that she never returned (Youngblood: 2891-92). Petitioner added that he was "taken in for questioning" a couple of times (Youngblood: 2891). Petitioner felt his wife had been murdered, noting that he had learned she had a "drug problem" and affairs (Youngblood: 2892). Specifically, Petitioner felt she "went to Central Park to hang out with her druggie friends. It was probably a drug related death" and Youngblood concluded that Petitioner was "a victim in the whole situation" (Youngblood: 2892).

Petitioner also told the doctor that, after Katz disappeared, he went to "either a party or friend's house out in New Jersey" and that he became nervous when she did not come home the following day. Dr. Youngblood had flown with Petitioner, and knew that he made entries in a flight log every time they flew, but Petitioner did not mention to Dr. Youngblood that he flew a plane on the day Katz disappeared (Youngblood: 2892-93).

*16 Petitioner and Carol Fisher ("Fisher"), a healthcare industry executive in Las Vegas, were "fixed up" on a blind date in January, 1995 (Fisher: 2823-24, 2829-30). They entered into a relationship that lasted six or seven months, until Petitioner advised Fisher in a cell phone call that he would not

continue to date her because she had a child (Fisher: 2824, 2828-29). On the first night they went out, Fisher asked if Petitioner had been married; he was "hesitant" to answer and Fisher decided to make a joke: she asked Petitioner if he killed his wife (Fisher: 2824-25). Petitioner was "pretty surprised and stunned ... pretty shocked" (Fisher: 2825). He looked "kind of pale," and asked what Fisher knew (Fisher: 2826). When she asked what had happened, Petitioner told her that they had an argument[,] they were going [to], I believe a birthday party for his nephew, they had an argument, and she had left abruptly. She was upset and left in her shorts and a halter top. I recall him talking to me about the fact that she had drug problems and had potentially [maybe] dated others, was having affairs during their marriage

(Fisher: 2826-27). At other times, Petitioner said that he thought "possibly that she had committed suicide" and he "also had suggested that foul play-she had been involved with a variety of men" (Fisher: 2827). During their relationship, Petitioner and Fisher flew together "a lot" (Fisher: 2827). She observed that he was "pretty compulsive, obsessive and meticulous" in making entries in his flight log (Fisher: 2827-28, 2830-31). In addition, during Petitioner's time with Fisher, the two occasionally argued and Fisher "vividly" recalled that on one of these occasions Petitioner told her that she "should have seen his temper in the past" and that he had gotten "much better" (Fisher: 2828).

Dr. Charles Hirsch ("Dr.Hirsch"), the Chief Medical Examiner for New York City, advised the jury that, prior to the onset of rigor mortis, a dead person's

body-and especially a small body-is "pliable." The body of a person who was about 5 feet 3 inches tall and weighed about 110 pounds could easily be folded and tied into a package that would be only about 36 inches long (Hirsch: 2851, 2859-61). Alternatively, a body might be "disarticulated" at the joints, with the head and four limbs severed, to make identification difficult or permit the body to be "concealed or disposed of." Such a process was "very simple"; anyone who had taken an anatomy class in a United States medical school could disarticulate a body in minutes. Given a sharp knife, the doctor continued, he could perform the task in perhaps ten minutes (Hirsch: 2855-59).

Doorman Edgar Rivera ("Rivera") and building superintendent Susan Maras ("Maras") described the exits from Petitioner's building. The building had a front door watched by a doorman, a service exit that was not staffed on weekends, and a third exit into a commercial garage (Rivera: 2592, 2596; Maras: 2979, 2984-94, 2997-98, 2999-3000). A camera was placed near the service exit and another by the garage exit, but in 1985 no recordings were made with those cameras (Maras: 2294-96). The camera images could be seen by the doorman at the front door, but there was only one doorman, and he had to perform services for the tenants of the 442 apartments in the building (Rivera: 2593; Maras: 2996, 2999).

*17 Joseph Foresto ("Foresto"), a safety inspector for the Federal Aviation Administration, advised the jury that a Cessna 172-the "base line, the hallmark training aircraft" of this era-is "very user friendly," "stable," "easy to handle," and "a very basic simply aircraft" (Foresto: 2521-22, 2526-28). Charles

McKenna ("McKenna") of McDan Aviation agreed that the Cessna 172 was "pilot friendly" and "probably one of the easier airplanes ever built as far as flying." If the pilot took his hands off the controls the airplane would stay "pretty much straight and level" (C. McKenna: 2503-04). The New York region is "congested" and "restricted," but Foresto believed that in 1.9 hours a Cessna 172 could make a round trip, with clearances, from Caldwell Airport as far as Albany to the north, "almost" to Cape May, New Jersey to the south, or could fly perhaps 100 miles directly out over the Atlantic Ocean and then return (Foresto: 2529-51). McKenna estimated that a 170 mile round trip could be made (C. McKenna: 2505-06, 2508). Official tapes concerning such a flight and its clearances would routinely be erased after 15 days (Foresto: 2548-49, 2258-60). McKenna advised the jury that no flight plan would have to be filed by a pilot renting one of his planes at Caldwell Airport, "if the weather conditions are clear" (C. McKenna: 2489-90).

According to Foresto, for even a "reasonably competent" pilot, it would not be difficult to "dispose" of an object during such a trip; the pilot could reduce speed, reach across the narrow cockpit to open the passenger door, and simply push the object out (Foresto: 2553-55). Ejecting an object from the passenger door would be simpler still, should the pilot just raise the plane's nose and use the rudder to bank to the right-"not a difficult" maneuver, and one on which pilots are tested (Foresto: 2555-57, 2560-62).

Sergeant Matthew Rowley ("Rowley") of the police department's Aviation Unit performed three flights on October 11, 2000. On each occasion, the sergeant,

acting without assistance, loaded a 110 pound duffel bag into a Cessna 172 rented from McDan Aviation at Caldwell Airport (Rowley: 2510-11, 2915-21, 2926, 2931-32). He then flew about 20 miles over the ocean, slowed down, raised the nose of the plan, and dumped his duffel bag (Rowley: 2914, 2921-25, 2926-27). Twice he ejected the bag from the passenger door; the third time he dragged it over his lap and expelled it from the pilot door (Rowley: 2926). Though the sergeant was a novice at dumping bags from planes, it was unnecessary for him to bank the plane on these occasions (Rowley: 2926). The jury was shown videotapes of Sergeant Rowley's activities, taken from the rear seat of his plane and from an accompanying helicopter (Rowley: 2929-20, 2921, 2927-39; P.Ex. 21-23).

At trial, the jury also heard a stipulation that a woman's torso was recovered near "the Navy pier" on Staten Island on May 21, 1989 (Stipulation: 2946). Based on x-ray analysis, the Medical Examiner's office initially determined that the torso was Katz's; however, in 1998, DNA analysis "conclusively" proved that this determination had been incorrect (Stipulation: 2946-48).

*18 Joel Davis ("Davis") the only defense witness, who was 60 years old at the time of trial, had been in the textile business and then "different types of investments," was in 1985 a volunteer worker (Davis: 3020-24).

Davis told the jury that on July 7, 1985, he visited H & H Bagels, on 2d Avenue in "the 80's" and went with a "girlfriend" he saw for perhaps two years, but whose last name he had since forgotten (Davis: 3024, 3034-

35). At 2:00 or 3:00 p.m., or possibly as early as 1:00 p.m., he noticed a woman he had never seen before as she stood in line (Davis: 3024-25, 3030, 3034, 3039, 3052-54). Davis recalled that this woman was with a second woman, apparently "a very close friend;" they were both in "beach attire" and deeply tanned, and that he saw "a lot of oil" on their bodies and that each woman carried a large beach bag; at trial he was unclear as to whether either woman had a beach chair (Davis: 303-38, 3047-48, 3056).

Davis looked at the first woman frequently, because "a combination of things" drew his attention to her because in the first place, Davis had been in the textile business, and the woman wore a very attractive t-shirt bearing a "very distinctive" print which included a representation of a map or an island done in a "magnificent" way, "probably" in "several" colors. After admiring that shirt, Davis ultimately looked at the woman in this shirt "as a man" would, and was attracted to her; the woman's face reminded him of the face of a friend's exsister-in-law and her body was like that of Davis's ex-wife and was an "excellent, great body," and he thought her chest was "well-developed" (Davis: 3025-26, 3039-47). Davis pointed the woman out to his girlfriend, and thought to himself-and may have remarked to his companion-that the woman was "a good looking woman" (Davis: 3025).

Two or three weeks later, Davis saw posters depicting Katz, and called the police (Davis: 3026-27, 3048-50). In September, 1985, Davis was shown a photograph of Katz and at trial, he recalled that he said he was positive the photo depicted the woman from H & H Bagels (Davis: 3027-29, 3056-58). He did not recall

saying to the detective that he was not sure (Davis: 3058-60). He "possibly" said to the police that the woman had worn pink shorts, but did not mention her attractive t-shirt (Davis: 3050), and indeed "possibly" described the t-shirt as white and loose-fitting (Davis: 3055). Davis later insisted to a defense investigator that Detective O'Malley had not shown him pictures, but he was confused about to whom the investigator was referring (Davis: 3061-63). He also told the investigator that the woman at H & H Bagels was "statuesque," but he was confused when he said that as well; the woman was only about five feet one inch tall (Davis: 3064-65). At trial, Davis explained that when he called the woman "tall" and "statuesque"

I confused her, I confused my ex-wife's body in which she was five-foot one with my friend's exsister-in-law, who is tall, but had her face. So I was confusing two different women in regards to that*19 (Davis: 3067).

Detective O'Malley interviewed Davis at Davis's home on September 24, 1985, and showed him three photographs of Katz (O'Malley: 3074-77). Davis picked one and said that it "could be the girl" that he saw "in the flier," but that he was not sure (O'Malley: 3077-78). Davis seemed to "relate" to the photographs, as "it reminded him of his ex-wife" (O'Malley: 3078). Davis also said that the woman in the flier was "similar" to the woman he saw in the bagel store (O'Malley: 3079-80).

The People introduced a 1985 photograph of Katz wearing a two-piece bathing suit, and Alayne Katz testified that the photograph accurately depicted Katz, who was under five feet three inches and wore an "A cup" bra (A. Katz: 3072-73; P.Ex. 73).

The Indictment Delay

As set forth during the trial, an investigation was commenced upon the report by the Petitioner that Katz was missing, but her body was not recovered.

Investigator Wittman, as part of the "Closing Report" dated April 27, 1987, wrote the following:

On 4/24/87 the writer was informed by ADA Fogel that Pitler agrees that at this time the case should be closed. Chief Rosenzweig is in agreement that at present no further action is required by the Investigations Bureau. Pending unforeseen developments this case is closed.

(Exhibit 0 to White Affirmation in support of Bierenbaum's 440 motion).

In paragraphs 31-33 of ADA Bibb's affirmation in response to Bierenbaum's 440 motion, ADA Bibb stated that a Medical Examiner's Office radiologist concluded that the torso found washed up in Staten Island in 1989 could be Katz's, and a forensic radiologist consulted by the Medical Examiner's Office concluded that it was Katz's, the Department of Health Office had issued a death certificate for Katz, "[i]t was decided that the investigation into the death of Gail Katz Bierenbaum would not be presented to the grand jury." In paragraph 49 of that affirmation, ADA Bibb stated that DNA testing in 1998 showed that the torso was not Bierenbaum's and "[t]he investigation again turned into a homicide investigation without a body."

The People conceded that "the investigation was reopened despite the lack of any new evidence" (Bibb Affirmation filed in response to Bierenbaum's 440 motion, ¶ 53) and that "a thorough and exhaustive investigation of Gail Katz Bierenbaum's disappearance" had been conducted from July 1985 until April 1987. (Bibb Affirmation filed in response to Bierenbaum's 440 motion, ¶ 14.)

On October 17, 1986, investigators with the District Attorney's Office learned that Bierenbaum, a licensed pilot, had rented an airplane from McDan Aviation on July 7, 1985, the date of Bierenbaum's disappearance (2568-70). Federal Aviation Administration regulations required Bierenbaum to keep a flight logbook in 1985. See, 14 C.F.R. §§ 61.51, 61.59. Furthermore, on December 18, 1986, at a meeting between Greenfield, Bierenbaum, and Detectives O'Malley, Dalsass and Powers, the detectives asked Bierenbaum if he kept a flight log, a question which Greenfield interdicted. (2963-65).

*20 The Respondents have asserted that "it took time to discover that the Petitioner not only flew from Caldwell Airport on July 7, 1985 but also changed his flight log to obscure that fact." Two witnesses who flew in Bierenbaum's plane in the 1990's out of Las Vegas testified that he always made entries in the log when flew with them. (2893, 2828). However, Karnofsky, Feis, Katz and other witnesses who flew with him in 1985 and 1986 out of New Jersey did not. The People first learned about the existence of that flight log from Karnofsky, whose romantic relationship with Bierenbaum ended in an unfriendly manner due to Bierenbaum's having cheated on her. (2761-61, 2765-66, 2803-04).

The respondents also noted that women with whom Bierenbaum had romantic relationships in the 1990's-Stephanie Youngblood, Carole Gordon Fisher, Elise Sauer and Kim Angel-were interviewed during the reopened investigation and each of these women described conversations with Bierenbaum in which he gave them "inconsistent versions" of Bierenbaum's disappearance.

The indictment was returned on December 8, 1999.

The Standard for Constitutionally Adequate Representation

To demonstrate constitutional ineffectiveness, defendant must first show "that counsel's performance was deficient." Strickland v. Washington, 466 U.S. 668, 687 (1984); see also Lockhart v. Fretwell, 506 U.S. 364 (1993); Lindstadt v. Keane, 239 F.3d 191, 198 (2d Cir.2001). To make this determination, the court must decide whether "in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." Strickland, 466 U.S. at 689. Counsel's conduct must be judged on facts of the particular case, viewed as of the time of counsel's conduct. See id. at 690; see also Lockhart, 506 U.S. at 372. The reviewing court must "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance" and be careful to "eliminate the distorting effects of hindsight." Strickland, 466 U.S. at 689.

In addition to showing deficient performance, the defendant must show that the deficient performance

prejudiced the defense; it must be shown that there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694. A reasonable probability is one that "undermine[s] confidence in the outcome." Id.

Where a petitioner seeks habeas corpus relief, under the Antiterrorism and Effective Death Penalty Act, 28 U.S.C. § 2254,

a writ may issue only if ... the state court adjudication resulted in a decision that ... involved an unreasonable application of ... clearly established federal law, as determined by the Supreme Court of the United States.... Under the 'unreasonable application' clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from [the Supreme Court's] decisions but unreasonably applies that principle to the facts of the prisoner's case.

*21 Williams v. Taylor, 529 U.S. 362, 413 (2000).

In a petition for habeas relief based on ineffective assistance of counsel, the question as to whether the matter is governed by existing Supreme Court precedent is "easily answered because the merits of [such] claim[s] are squarely governed by [the Supreme Court's] holding in Strickland v. Washington," Id. at 390; see also Aparicio v. Artuz, 269 F.3d 78, 95 (2d Cir.2001). A petitioner is not required to further demonstrate that his particular theory of ineffective assistance of counsel is also clearly established. Aparicio, 269 F.3d at 95 n. 8; Sellan v. Kuhlman, 261 F.3d 303, 309 (2d Cir.2001). Application of the New

York State standard set forth in People v. Baldi, 54 N.Y.2d 137 (1981), is essentially consistent with the Strickland standard, so that relief is appropriate only if the legal principle was unreasonably applied. Lindstadt, 239 F.3d at 198.

Ineffective assistance can be established by counsel's failure to make a motion or take action where such motion or action would have been successful and there is no tactical reason for failing to do so. See Brown v. United States, 167 F.3d 109, 110 (2d Cir.1999).

In addition, failure to investigate or present exculpatory witnesses or other exculpatory evidence for no tactical reason can also amount to ineffective assistance. See Strickland 466 U.S. at 691; Lindstadt, 239 F.3d at 200.

Actions or omissions by counsel that might be considered sound trial strategy do not constitute ineffective assistance. See Strickland, 466 U.S. at 689; Jackson v. Leonardo, 162 F.3d 81, 85 (2d Cir.1998). A petitioner may rebut the suggestion that the challenged conduct reflected merely a strategic choice by showing that "counsel omitted significant and obvious issues while pursuing other issues that were clearly and significantly weaker." Mayo v.. Henderson, 13 F.3d 528, 533 (2d Cir.1994), cert. denied, 513 U.S. 820 (1994).

a. The Failure to Move to Dismiss the Indictment as Untimely

Petitioner has faulted his trial counsel for failing to move to dismiss the indictment on the grounds that it was untimely.

A delay in instituting a prosecution may implicate the accused's right to due process. United States v. Lovasco, 431 U.S. 783, 789 (1977); People v. Lesiuk, 81 N.Y.2d 485, 490 (1993). In evaluating whether a delay violates due process, a New York court will balance five factors: (1) the length of the delay; (2) the reasons for the delay; (3) the nature of the underlying charge; (4) whether there has been an extended period of pretrial incarceration; and (5) whether the defense has been impaired. People v. Taranovich, 37 N.Y.2d 442, 445 (1975). In making this assessment, no "one factor or combination of the factors ... is necessarily decisive or determinative of the speedy trial claim, but rather the particular case must be considered in light of all the factors as they apply to it." Id.

*22 Here, over fourteen years passed between the crime and the filing of the indictment. However, New York courts have not dismissed serious charges when only that factor operates in the defendant's favor. See, e.g., People v. Vernace, 96 N.Y.2d 886, 887-88 (2001) (affirming conviction, when indictment brought seventeen years after commission of crime); People v. Salcedo, 304 A.D.2d 309, 309-10 (N.Y.App.Div.2003) (same, after sixteen year delay); People v. Tsang, 284 A.D.2d 218, 218-19 (N.Y.App.Div.2001) (same, after twenty year delay); People v. LaRocca, 172 A.D.2d 628 (N.Y.App.Div.1991) (same, after seventeen year delay).

Because Katz's body had not been recovered, it was appropriate to delay the charges to await the passage of time. Because of the absence of a body, the evidence was circumstantial and could depend upon small

details. The prosecutors who considered whether to seek an indictment in 1987 quite rationally elected to await further developments.

Additional evidence was obtained over time. The passage of time without any word from or sighting of Katz enhanced the circumstantial proof that she was murdered. In addition, the People submitted on trial evidence of the Petitioner's consciousness of guilt which evidence was obtained over time. While investigators discovered that Petitioner flew from Caldwell Airport on July 7, 1985 (T. 2568-70), his flight log, which the People alleged had been altered, was not discovered or subpoenaed until 2000.

After time had passed, a newly created unit designed to investigate so-called "cold cases" was formed; this unit reviewed the case in the normal course of their duties and made the professional judgment to go forward (PApp A: 4). New York courts consider decisions of this sort proper and acceptable explanations for pre-indictment delay. See Vernace, 96 N.Y.2d at 888; Lesiuk, 81 N.Y.2d at 490; Singer, 44 N.Y.2d at 254.

The charge of murder was, of course, serious and for the reasons already noted a more complex case than the routine homicide.

As to incarceration, Petitioner was at liberty during the years from the murder in 1985 to the indictment in 1999.

As to the final Taranovich factor, here has been no showing that the Petitioner's defense suffered from the delay. Petitioner realized immediately that he was

a suspect in his wife's disappearance, and he hired a lawyer in 1985, one of the two attorneys who represented him at trial.

The passage of time certainly dimmed the memories of those who were witnesses to the events of Petitioner's marriage and to Katz's disappearance. However, the People had the burden of proof beyond a reasonable doubt, and failures of memory made it more difficult for the People to satisfy that burden. See, e.g., Vernace, 96 N.Y.2d at 888.

Petitioner has argued that various individuals might have recalled something helpful to him, had they testified years before they did. That general complaint cannot serve to establish cognizable prejudice. See United States v. Williams, 372 F.3d 96, 113 (2d Cir.2004).

*23 The Petitioner has not cited a single exculpatory witness or piece of evidence that was available in or about 1985, but no longer available by 1999.

There is no reason to assume that, had the trial taken place earlier, either the witnesses who testified for the prosecution or those who were unavailable in 2000 would have recalled facts that were helpful to the defense, rather than facts that were simply more damning (PApp: A at 10-11).

All of these considerations were put to the state court, when petitioner complained after trial of the conduct of his attorneys. The state judge considering Petitioner's motion assessed the five Taranovich factors. She then concluded that, had Petitioner's counsel made a motion to dismiss, "there is no

possibility" that the motion would have been granted, and that "[t]here was no chance of success" for such a motion (PApp: A at 9).

Nothing has been presented in this proceeding to alter the state court conclusion:

In sum, although the pre-indictment delay was significant, defendant was not incarcerated at any time prior to trial. If he can be said to have suffered any prejudice from the delay, it was not substantial. Both the seriousness of the charge and the reason for the delay strongly militate against dismissal. The People proceeded in good faith and did not delay the prosecution in the hope of gaining a tactical advantage. Their caution was justified by the complete lack of direct evidence against the defendant, as well as the absence of direct proof that Gail Katz was dead. For these reasons there is no possibility that a motion to dismiss on the basis of pre-indictment delay would have been granted. Defense counsel cannot be faulted, therefore, for not filing such a motion. (PApp: A at 17-18).

The state court concluded that defense counsel was not ineffective for failing to move to dismiss the indictment for untimeliness because Petitioner did not suffer prejudice from the delay. That conclusion was reasonable and not contrary to established federal law. Williams v. Taylor, 529 U.S. at 412-13.

b. The Conduct of Defense Counsel at Trial Was Reasonable

The Petitioner has asserted that the opening statement of his defense counsel led to otherwise

inadmissible evidence with respect to the effort of the police to conduct a forensic search of Petitioner's apartment. Counsel who opened on Petitioner's behalf was not the attorney retained by Petitioner in 1985, and he advised the jury that a forensic examination of Petitioner's apartment had turned up no suspicious evidence. The People elicited evidence that Petitioner's attorney retained in 1985 had refused to permit a complete forensic examination. The prosecutor noted the evidence about the bar to a search only to remind the jury that Petitioner had lied when he said to Caruana that the police had searched his apartment. As set forth by the state judge who denied Petitioner's post-judgment motion, the reference to this was of little import (PApp: A at 26-28). In addition, as also noted by the reviewing judge, trial counsel effectively informed the jury that it was not Petitioner, but his attorney, who declined to cooperate with the police (PApp: A at 28-29).

*24 The Petitioner has asserted that his attorneys acted unreasonably because they did not call Pablo Alvarez and June Sherman at trial.

As testified to at trial, Petitioner initially advised the police that doorman Edgar Rivera reported seeing Katz leave her apartment building on the morning of July 7, 1985 but Rivera testified that he last recalled seeing Katz the day before she disappeared. Before trial, Petitioner's attorneys interviewed Pablo Alvarez ("Alvarez"), a porter who worked at defendant's building. Alvarez advised that he saw Katz leave on July 7th, wearing shorts and a t-shirt. Counsel decided not call Alvarez as a witness.

As the state trial judge determined, however, counsel's determination was a readily defensible strategic judgment (PApp: A at 20, 22-23). He told the authorities in July 1985 that he did not recall seeing Katz on July 7th, and that he did not remember how she was dressed on the last occasion on which he saw her. He made similar statements to investigators in 1999 and 2000 (People's Memorandum of Law in Opposition to Post-Judgment Motion at 12-13). Alvarez believed that he had testified in the grand jury, when he had not. Reasonable attorneys could readily decide not to call a witness who would be unable to explain on cross-examination how he had come to remember an unremarkable event from 15 years before, when he had been unable to recall that matter just days after it had occurred.

In 1985, June Sherman ("Sherman") lived in the apartment below Petitioner's. In 1985, Sherman told the police only that Bierenbaum and Katz fought constantly, like "cats and dogs." In 1998, she related that the two always fought on Sundays, that she frequently heard screaming and the sound of banging furniture, that on July 7, 1985, she heard screaming and the sound of Katz's high heels on the floor and she then heard a loud bang, apparently the slamming of a door-but not necessarily the front door of the apartment-followed by silence (PApp: A at 18; People's Memorandum of Law in Opposition to Post-Judgment Motion at 13-15).

After trial, Petitioner's new counsel obtained an affidavit from Sherman explaining that, if called as a witness, she would have testified that she believed what she heard was the sound of Katz leaving Petitioner's apartment (PApp: A at 19). Petitioner

now asserts that the failure to call Sherman was professional incompetence.

However, defense counsel in fact sought to call Sherman. During trial, counsel obtained a material witness order and provided Sherman's Arizona address to Arizona attorneys retained to serve the order on Sherman. Over the two remaining weeks of trial, the attorneys could not locate Sherman. As the state court determined, it might have been "prudent" had defense counsel contacted Sherman earlier (PApp: A at 21), but their efforts were nonetheless "diligent," and "it was reasonable to believe that she would be available in time to be interviewed and ... testify" (PApp: A at 21).

*25 In any event, the inability to call Sherman did not prejudice the defense, for there is no "reasonable likelihood" that her testimony would have led to an acquittal. Sherman's only information potentially helpful to the defense was that, during Petitioner's fight with Katz on July 7th, she heard a door slam, followed by silence. That testimony, even if fully credited, did not establish that Katz left the apartment. As the state court concluded, if the jury did not conclude that the slammed door was the front door to the apartment, "it would have undermined the scenario suggested by the defense and strengthened the prosecution's theory that [Petitioner] had killed [Katz] in the apartment" (PApp: A at 22).

Sherman's testimony of constant fighting between Petitioner and Katz, including a screaming match just prior to Katz's disappearance, also would have been damaging to the defense. Sherman's account of hearing Katz's high heels on July 7th was also

inconsistent with Petitioner's claim that Katz wore sandals when she left the apartment. Finally, Sherman did not offer the details about the slamming door and the ensuing quiet when interviewed in 1985 and only elaborated when she spoke with the authorities in 1998 and 2000.

Inability to locate and present such testimony under all the circumstances is not unreasonable.

Petitioner has also contended that counsel did not do a better job of labeling Katz as a serious cocaine abuser. Segalas testified at trial that he and Katz used cocaine together twice. However, in 1985 Segalas had told a detective that he and Katz used cocaine on "numerous" occasions. Petitioner has contended that counsel failed to impeach Segalas with this statement to enhance the possibility that Katz was killed by narcotics dealers.

Counsel stated that he saw no need for the suggested impeachment, and the trial judge agreed (PApp: A at 31-33). The theory that she was killed by drug dealers was without any evidentiary basis, as noted by the Appellate Division. 301 AD.2d at 136.

In the People's summation, the prosecutor argued that Petitioner intentionally strangled his wife. Petitioner has assigned as error the fact that trial counsel did not object to the prosecutor's remarks, on grounds, for example, that they were too graphic, were unsupported by the evidence. The state judge who denied Petitioner's post-judgment motion had two reasons for rejecting that complaint. In the first place, trial counsel had a reasonable, tactical basis for failing to object: he feared that if he interrupted the

People's summation, the trial judge would "sum up" in favor of the prosecution. The post-judgment court credited that explanation, and even supplemented it with another (PApp: A at 23-24). As the court correctly held, counsel's choice was a tactical "judgment call." The state court observed: "[H]ad trial counsel contemporaneously objected he would only have preserved meritless issues for appeal" (PApp: A at 35).

*26 Petitioner now complains that defense counsel was incompetent because during trial, defense counsel advised the jury that Katz was dead, that she "likely" died on July 7, 1985, and conceded that Petitioner had once choked her, and that Petitioner was a man with a substantial temper. As the post-judgment motion court recognized,

Defendant was not prejudiced by his attorneys' concession that Katz was dead, as the proof permitted no other inference. Had they not made the tactical choice of defusing the issue in this manner they would have been placed in the counter-productive and almost ludicrous position of arguing that she had vanished without a trace but was still alive fifteen years later. There was also sufficient proof in the record to have made it impossible for the attorney to have contested the choking incident and defendant's bad temper. The jury heard too many corroborative accounts to have had any doubts as to these facts and conceding them was therefore not prejudicial. Additionally, as is clear from the affidavits of trial counsel made a strategic decision to concede them based on his assessment that they were necessary to show why the Bierenbaums sought counseling. His decision should be second-guessed with the wisdom of

hindsight ....(PApp: A at 25).

Counsel certainly did not suggest to the jury that he, or Petitioner, knew when Katz died. His recognition that she "likely" died on the day she disappeared can be considered a sensible technique designed to defuse a no-win issue. As the court noted, "the circumstances surrounding the disappearance of Katz as well as other evidence in the case ... compel the conclusion that she died on July 7th" (PApp: A at 26). Further, the defense was that Petitioner simply did not know how she died and stated the obvious-that Katz "likely" died when she disappeared.

Petitioner also asserts that his counsel acted unreasonably by failing to produce evidence of the Police Department's Patrol Guide, which in 1985 stated that persons over 18 who left their homes for personal reasons would not be considered "missing" until sufficient time passed for their absence to be considered involuntary. The prosecution having argued to the jury that Petitioner acted callously when he, among other things, waited until the night of July 8, 1985, to report that Katz had been missing since the morning of July 7th. Apparently, the Patrol Guide provisions were irrelevant because Petitioner would not have been aware of them. The post-judgment motion court concluded, "[t]rial counsel's judgment was correct and he was justified in not bringing the Patrol Guide provisions to the jury's attention" (PApp: A. 41).

Petitioner now contends that his counsel was ineffective because he did not move for dismissal on the ground that proof of murderous intent was lacking. However, the prosecution contended that the

evidence established Petitioner had killed Katz after an argument. That evidence supported an argument that Petitioner intended to kill. The post-judgment motion court put it succinctly:

*27 It would have been pointless to make such a motion, as the record is replete with evidence from which the jury could have inferred, beyond a reasonable doubt, that defendant had the specific intent required by statute....As the Appellate Division noted, 'this abundant array of damning circumstantial evidence proves beyond any reasonable doubt that defendant intentionally killed his victim ...'(PApp: A at 43-44).

Under New York law, the trial court has discretion to admit demonstrative evidence that might aid the jury. In this case, the court admitted videotapes of demonstrations by a police officer that it is possible for an individual to load a 110 pound weight onto a Cessna 172 and then dump it over the ocean. Petitioner has contended that trial counsel did not object to the admission of the videotapes, but, the opinion of the post-judgment motion court disposed appropriately of this contention:

This contention is without merit, as the Appellate Division indicated by way of dictum that the videotapes were properly placed before the jury....As the evidence in question was admissible, the attorney was not ineffective in failing to object to its introduction ...(PApp: A at 33).

The Petitioner has contended that counsel was ineffective for failing to move to dismiss on the ground that there was legally insufficient proof that he

murdered Katz in New York State. However, evidence was presented to show that Petitioner argued with his wife in their Manhattan apartment, and that he then killed her. Petitioner has suggested here that he might have driven with his wife to New Jersey on the afternoon of July 7, 1985, and killed her there (Pet. P. 54). However, statements made by Petitioner himself were to the effect that he last saw his wife alive in their apartment at 11:00 a.m. on July 7th, and that he went to New Jersey alone. Those admissions establish that trial counsel was not ineffective for failing to make such a motion.

DeCesare testified to statements made to her by Katz concerning a threatening comment Petitioner had made to her. As DeCesare recalled it, Katz said that she and Petitioner were watching a movie about the Claus von Bulow case when Petitioner told her that von Bulow's mistake was leaving evidence, and that he would not leave evidence. Petitioner has asserted that this was devastating testimony, but that it could not be true, in that the only movie about the von Bulow case was made in 1990. He now contends that his trial counsel were ineffective because, during the weeks between verdict and sentence, they did not investigate whether films about the von Bulow case had been made, discover the error, and move for a new trial based upon it.

The court which denied Petitioner's post-judgment motion that "[i]t would have been remarkable" for it to occur to counsel to investigate "this relatively minor aspect of the trial" before sentence (PApp: A at 44). In addition, as found by the court, under New York law a motion for a new trial could not be based upon the discovery of evidence that merely "impeached or

contradicted" a witness (PApp: A at 45). Further, the interval before sentencing was not a critical period, in that if a motion for a new trial could lie at all, it could have been brought after sentence under Section 440.10 of the New York Criminal Procedure Law.

*28 At the time of Petitioner's admission and Katz's statement about it, the von Bulow case was prominently featured in television news reports, as von Bulow's trial conviction had been reversed and a new trial ordered. State v. von Bulow, 475 A.2d 995 (R.I.1984). Whether it was a movie or a news report that caused Petitioner's comment would not substantially affect the impact of DeCesare's testimony.

C. Petitioner's Sixth Amendment Right to Confront Witnesses Against Him Was Not Violated

Petitioner has also asserted that hearsay was received at this trial in violation of his Sixth Amendment right to confront witnesses.

However, a habeas corpus petitioner cannot present a federal claim to a District Court unless he has first "exhausted" that claim by advancing it in the highest state court with jurisdiction to entertain it. Bossett v. Walker, 41 F.3d 825, 828-29 (2d Cir.1994), cert. denied, 514 U.S. 1054 (1995). In this case, petitioner did not argue, in his application for leave to appeal to the New York Court of Appeals, that his federal confrontation rights had been violated by the admission of hearsay at his trial. Petitioner's entire argument was instead based on New York's hearsay rules.

Generally, a failure to exhaust state remedies obliges the petitioner either to return to state court, or to abandon the unexhausted claim. See Rose v. Lundy, 455 U.S. 509, 510 (1982); Zarvela v. Artuz, 254 F.3d 374, 380-82 (2d Cir.2001), cert. denied, 534 U.S. 1015 (2001). In this case, while Petitioner could have presented his Confrontation Clause claim to the Court of Appeals, he did not, and can no longer do so. People v. Liner, 70 N.Y.2d 945, 945 (1988). As a result of his failure to present the claim to the Court of Appeals, Petitioner likewise cannot present that claim in post-judgment proceedings in the state trial courts. N.Y. C.P.L. § 440.10(2)(a), (2)(c).

When a Petitioner's procedural error in presenting a claim prevents him from thereafter exhausting the claim, the error forfeits the claim, "absent a showing of cause for the procedural default and prejudice resulting therefrom." Grey v. Hoke, 933 F.2d 117, 121 (2d Cir.1991). Petitioner has made no such showing.

Furthermore, the admission of the statements did not offend Petitioner's right to confront witnesses against him. The Confrontation Clause applies only to "testimonial" statements. Davis v. Washington, 126 S.Ct. at 2274-76. A non-testimonial statement, "while subject to traditional limitations upon hearsay evidence, is not subject to the Confrontation Clause." Id. at 2273.

The statements by Katz about which defendant now complains were not "solemn declaration[s] or affirmation[s] made for the purpose of establishing or proving some fact." Id. at 2274 (quoting Crawford v. Washington, 541 U.S. 36, 51 (2004)). The declarations here at issue were confidences imparted by Katz to

her friends and relatives, and were in no sense intended to be official reports which would some day be aired in a court room. Aside from the statement of Katz's cousin, Hilliard Wiese, which the Appellate Division found to be harmless error, none of the statements at issue was admitted for the truth of the matter. Bierenbaum, 301 A.D.2d 119, 144, 149. Rather, each of these statements was admitted to demonstrate Katz's state of mind, or the state of the Katz-Bierenbaum marriage. See id. Statements not admitted for their truth do not implicate the Confrontation Clause. Crawford, 541 U.S. at 59 n. 9.

*29 Accordingly, the admission of Katz's out-of-court statement was not "contrary to" and did not "involve[ ] an unreasonable application of clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1).

c. The Conduct of Appellate Counsel Was Reasonable

The omission even of an obvious appellate point gives rise to proper complaint only if counsel advanced "clearly and significantly weaker" claims in its place. Mayo v. Henderson, 13 F.3d 528, 533 (2d Cir.1994). "Appellate advocacy is meaningful if it reflects a competent grasp of argument." People v. Stultz, 2 N.Y.3d 277, 285 (2004).

Petitioner's appellate attorneys, one of whom had represented him at trial, were familiar with the trial record. In their brief to the Appellate Division, Petitioner's counsel outlined their contentions in a 33-page filing, and then presented a cogent argument that guilt had not been sufficiently demonstrated (PApp: H, Petitioner's Appellate Division Brief at 4-

37, 115-25). In addition, counsel presented highly sophisticated Molineux and hearsay claims (id. at 38-104). They then added two arguments that speculative and prejudicial proof had been admitted, and concluded with a contention that the indictment should be dismissed, or at least, a retrial should be held before a different judge (id . at 105-14; 125-30). After the People responded, a 52-page reply brief defended all points presented in the main brief (PApp: H, Petitioner's Reply Brief at 39). When the judgment was affirmed, Petitioner's attorneys applied for leave to appeal to the Court of Appeals in long letters that pressed three preserved points and noted others that might also have interested the Court. Finally, counsel presented an extended Confrontation Clause complaint in a petition for certiorari.

Petitioner has contended that reasonable appellate counsel would have presented one additional claim: that the trial court erred in granting the People partial relief pursuant to Batson v. Kentucky, 476 U.S. 79 (1986).

The Petitioner now asserts that the state trial court misunderstood the three-step Batson procedure for determining the validity of peremptory challenges, and as a result wrongly shifted the burden of proof to Petitioner.

The parties are in accord as to what a trial court must do to resolve a Batson challenge. Resolution of such a challenge requires a three-step process: First, the challenger must make a prima facie showing the peremptory strikes were purposely used to exclude members of a cognizable group; Second, the respondent must rebut this inference of

discrimination by providing a neutral explanation; Third, the court must weigh the evidence and determine if the challenger has met his burden of persuasion that the peremptory strike was motivated by unlawful discrimination, not the proffered neutral explanation. Batson, 476 U.S. at 97-98.

Potential jurors were individually examined in camera about whether they could fairly evaluate testimony on a charge of murder and testimony with respect to domestic violence. Near the end of the single "round" (1759), the People suggested that the defense had exercised discriminatory challenges against women in violation of Batson. The court immediately recognized that "there is no question that the defense has challenged most of the women on this panel" (1759). The court noted that the prosecution was obliged "to make a prima facie showing that the related strikes were related to sex" (1760). The Assistant District Attorney answered that the court had made the same point in an earlier off-the-record conversation, but that "every challenge that they have used save two have been females and sheer numbers demand at least at this point" that the People offer a challenge (1760).

*30 The court responded:

I do think there is a serious issue when the Defense challenges most of the women, the young women on the panel and, frankly, the only thing is that in view of the fact that I was present obviously for a lot of individual screening, I don't know whether you can pass step one of Batson but if I were you, it's your obligation, both sides, to make a Batson challenge where it appears to be warranted.

(1761-62). The court added that the prosecutor could review his notes, and should not make a formal Batson application if "after you look at it seriously there is no possibility of meeting the Batson test, and step one is what I am talking about clearly ..." (1763). After a recess, the prosecution made a formal Batson challenge 1769-73). The People argued that the defense struck as many women as possible among the first forty-four jurors who faced challenges and sought completely to avoid the remaining jurors, almost all of whom were women (1772). The prosecutor concluded "that the sheer numbers make out a prima facie case and that the court ... should acquire of the defense the neutral reasons for each challenge" (1772). He continued, "Gender neutral challenges reasons for each of their challenges" (1773).

The court's answer was clear:

I take Bibb's [the Assistant District Attorney's] point to this extent. I want you now to have the burden to come forward to indicate why these peremptory challenges against all these women were exercised to overcoming discrimination. I want to hear a gender-neutral explanation (1773). Defense counsel responded that he "would like to talk about the prima facie ..." (1773). The only fair reading of the following remarks is that the court ruled that the prima facie issue "was pretty obvious" and repeated that defense counsel should address individual strikes (1773-74).

The defense next offered explanations for its challenges (1774-80), noting at one point that the "question is whether [challenges] are gender neutral" (1777). The Assistant District Attorney did not deny

that the defense explanations were gender neutral; obviously meaning to move to stage three of the Batson test, he argued that "many of these reasons are transparent" and that the defense "kept other people in similar situations" (1780-81). The court interrupted to note that some defense explanations were "non-potectual [sic]," and thus valid (1782-83). The court added:

I am sympathetic to your position in the sense that I clearly see what has happened here. I clearly agree that there may be a secondary agenda. That is not what the law says. The law permits them to exercise their peremptories and to come forward with the gender neutral explanations for striking the jurors and the law says very clearly in People v. Allen, this is not a heavy burden that it can be satisfied by a fairly neutral explanation quoting from People v. Allen, 86 N.Y.2d, 101 and we also know that non-potectual [sic] reason does not rise to the level of the challenge for cause.

*31 People v. Hernandez. Now when the proper explanations appear to be gender neutral I have to determine whether the proponents of the strike has proven purposeful discrimination and the focus is whether the gender neutral explanation is a mere pretext for the gender discrimination (1783-84).

In response, the prosecutor urged the court on to "the third step" (1785-86). The court answered that "[y]ou have the burden of persuading." The Assistant District Attorney "The third step is gender neutral or pretextual. The best and easiest way to see if it is pretextual is to see if there are similarities, people similar that they kept" (1786). After the court noted,

"[y]ou came up with one such similar person," a second Assistant District Attorney began to explain why the "allegedly gender neutral explanations" were pretextual. He began by suggesting that "the case law permits the Court to look to the people they allowed to be seated," and the judge answered "I know that" (1786). In answer to a defense objection, the court added:

They have a right to show me that you put on people who are in exactly a similar position-kicked off people who are similar-in the similar position as people you left on (1787).

The prosecutor limited his comments to five of the jurors challenged by the defense. When he was done, the court noted to defense counsel:

They are pointing out some very important factors that you have to address that are clearly criteria that are looked at in case after case where you challenge somebody, let me finish, when you challenge someone claiming that it's gender neutral and that person is exactly in the same position as other people

(1791). After continued debate about particular challenges, the court asked the People what remedy they sought. The Assistant District Attorney answered that he was asking the court to seat five of the women peremptorily challenged by the defense (1795-96). The court opined that "this is a very close issue." The court went on to say:

I am absolutely certain that the defense has deliberately eliminated women but I am not certain that they have done so in a manner which gives me

the right legally-I am not certain how I want to rule and whether you are entitled to a remedy. It's an extremely close question, much closer than any Batson issue I have had because there are ostensibly reasons for challenging many of the jurors and they have offered those reasons. I then have to determine whether they are pretextual and, et cetera, et cetera. So this is a very delicate area. (1796-97).

The court then adjourned the proceedings to review the law. When the court went back on the record, it observed that I pulled out a couple of cases that I was looking for and couldn't find in my file.

And I'm not going to re-state the law. I've referred to it several times. We're all familiar with the basics of Batson, the steps, and the law itself.

*32 (1798). Next, the court briefly described three Appellate Division Batson decisions it had reviewed during the preceding adjournment, and made its ruling. (1798-1800)

Petitioner has suggested that a winning appellate argument might have been grounded on a claim that the court misunderstood the law, but the record fails to establish that proposition. A claim that the trial court misapplied Batson procedure would have had to be preserved by specific objection at trial. See People v. Richardson, 100 N.Y.2d 847, 853 (2003). Petitioner's trial counsel made no objection on that front.

The prosecution argued that defense excuses for challenges to women were unbelievable by pointing to men with the same characteristics who were not

challenged (1780-87). Defense counsel responded to each suggestion by proffering new reasons why the unchallenged jurors might be considered different from the accepted jurors (1787-95). The trial court heard defense counsel, and concluded that these defense explanations were mere pretexts for discrimination (1801-02). At the end of the argument about the defense strikes, the prosecution asked that the court seat five jurors: Barrett, La Branche, Gevalt, and two others. The court seated the three named jurors. As to each, the defense challenges could be considered pretextual as the trial court concluded, the defense having accepted other jurors with similar characteristics (1801-02).

Petitioner also has maintained that a competent appellate attorney would have protested about the remedy accorded. The trial court found that Petitioner wrongly challenged at least five potential jurors because they were women. The court then decided that, to be "fair," it would seat only three of the five.

Petitioner has noted that the Appellate Division reversed this trial judge in another case for seating only one of three jurors who were the subject of a Batson challenge. In People v. Claudio, 10 A.D.3d 531 (N.Y.App.Div.2004), the Appellate Division reversed because the defense was wrongly denied a full remedy for a Batson claim. The defense alleged that three jurors had impermissibly been stricken by the People; the trial court seated only one of them, and made no ruling about the other two. Id. at 534. Here, it was the People who received an incomplete remedy, as the Court seated two of the five jurors it had found were impermissibly challenged based on sex. (1804).

The claims Petitioner's appellate counsel did advance were arguably more powerful than the Batson issue. An effective advocate could readily decide not to test the patience of an appellate court for adding a fact-intensive, partially unpreserved Batson point to what was already *a* 130-page brief. "Effective appellate representation by no means requires counsel to brief or argue every issue that may have merit." Stultz, 2 N.Y.3d at 285.

In light of the foregoing, the Appellate Division's conclusion that Petitioner was not denied his right to the effective assistance of counsel is appropriate. 2006 N.Y.App. Div. LEXIS 2772, at *1.

Conclusion

*33 For the reasons stated above, Bierenbaum's petition and motion for reconsideration are denied.

As Petitioner has not made a substantial showing of the denial of a constitutional right, a certificate of appealability will not issue. 28 U.S.C. § 2253; see also United States v. Perez, 129 F .3d 255 (2d Cir.1997); Lozada v. United States, 107 F.3d 1011 (2d Cir.1997). Pursuant to 28 U.S.C. § 1915(a)(3), it is hereby certified that any appeal from this order would not be taken in good faith. Coppedge v. United States, 369 U.S. 438, 444-45 (1962).

It is so ordered.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

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ROBERT BIERENBAUM,
Petitioner-Appellant,

v.

Harold D. GRAHAM, The Superintendent of Auburn Correctional Facility, Andrew Cuomo, Attorney General State of New York,
Respondents-Appellees.

----------X

Docket No. 08-1375-pr
Argued: July 8, 2009.
Decided: May 25, 2010

Marcia J. Silvers,
Marcia J. Silvers, P.A.
Miami, Fl., and
Mark D. Seiden,
Mark Seiden, P.A.,
Miami, Fl., for
Petitioner-Appellant

Mark Dwyer, Assistant District Attorney,
on behalf of Robert M. Morgenthau,
District Attorney, New York County, New York, NY,
for Respondents-Appellees.

Before: CALABRESI, HALL, Circuit Judges,
CALABRESI, Circuit Judge, filed a concurring opinion.

SESSIONS,FN* District Judge.

FN* The Honorable William K. Sessions III, Chief Judge, United States District Court for the District of

Vermont, sitting by designation.

SESSIONS, District Judge:

Petitioner-Appellant Robert Bierenbaum was convicted after a jury trial of murder in the second degree, *see* N.Y. Penal Law § 125.25[1], and sentenced to a term of imprisonment of twenty years to life. Currently incarcerated, Bierenbaum appeals from the February 26, 2008 judgment of the United States District Court for the Southern District of New York (Sweet, *J.*) that denied his petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. *See Bierenbaum v. Graham*, No. 06 Civ. 2120, 2008 WL 515035 (S.D.N.Y. Feb.25, 2008).

Bierenbaum claims that he was denied his Sixth Amendment right to effective assistance of counsel at trial, and that the admission at trial of numerous out-of-court statements made by the victim violated the Confrontation Clause of the Sixth Amendment. We affirm.

I. BACKGROUND

Bierenbaum's wife, Gail Katz Bierenbaum, was last seen on July 7, 1985. Her body was never found. In 1999 Bierenbaum was indicted and charged with murder in the second degree in her death. After an eight-day trial by jury in October 2000 before the Honorable Leslie Crocker Snyder in the Supreme Court of the State of New York, County of New York, the jury returned a verdict of guilty to the charge. Bierenbaum was sentenced on November 29, 2000.

A. The Disappearance of Gail Katz Bierenbaum

Gail Katz and Robert Bierenbaum were married in August 1982. They resided in a twelfth-floor apartment on East 85th Street in Manhattan. Bierenbaum had graduated from medical school in 1978, and was a surgical resident at Maimonides Medical Center in Brooklyn, New York. Katz was a graduate student pursuing a Ph.D. degree in clinical psychology at Long Island University.

On Saturday, July 6, 1985, Katz kept a follow-up appointment with her gynecologist, and made a further appointment in December. She kept an appointment with her hairdresser, and met with a close friend that afternoon for a couple of hours. She told her friend that she was going to leave her husband that weekend, and that she was looking for another place to live.

On the evening of Sunday, July 7, 1985, Bierenbaum attended a family gathering for a nephew's birthday in New Jersey, without Katz. Bierenbaum said that she had gone out earlier in the day and had not returned to their apartment. Although Bierenbaum did not express any concern about his wife at the party, later that evening at a friend's house he appeared distraught and called the apartment a couple of times. To his friend he related that he and Katz had an argument that morning and that she had left the apartment to sunbathe in Central Park wearing shorts, sandals and a halter top.

Close to midnight that evening Bierenbaum telephoned Dr. Yvette Feis, one of Katz's friends,

asking if she knew where Katz was. Bierenbaum told Feis that they had had an argument, that she had gone to Central Park and not returned, and that she was still missing when he returned from a family party in New Jersey.

Katz did not keep her regularly scheduled psychotherapy appointment on July 8. Bierenbaum called her therapist and others on that day asking if they had seen her. That evening Bierenbaum filed a missing persons report indicating that **41* when Katz was last seen she was wearing pink shorts and a white t-shirt. He told the detective assigned to investigate the case that he had last seen his wife on July 7 at approximately 11 a.m., and that she had left the apartment to get some sun in Central Park. He told the detective that he remained at home until approximately 5:30 p.m., when he left for New Jersey.

No one, other than Bierenbaum, reported seeing Katz after July 6.

B. Investigation

Detective Virgilio Dalsass from the 19th precinct, where Bierenbaum and Katz resided, and Detective Thomas O'Malley from the Missing Persons Bureau were assigned to investigate the case. In the week after Katz was reported missing, Dalsass left several telephone messages for Bierenbaum, none of which were returned. Dalsass had numerous telephone calls from members of Katz's family during that same time period. On July 14, Dalsass met with Bierenbaum, his father and Katz's parents. Dalsass asked Bierenbaum to narrate specifically and exactly how he spent the weekend that Katz disappeared. Bierenbaum stated

that he had come home from work at approximately 5 p.m. on Friday evening, that they went to a movie about 8 p.m. and returned about midnight. He described going to work Saturday morning, leaving the hospital and visiting his father, returning home around noon to go out to eat and do some shopping with his wife, including buying bras at a lingerie store and cat food at a pet supply store. Katz cooked steaks that night and they had a romantic candlelight dinner.

Bierenbaum told Dalsass that he had awakened at approximately 9:30 Sunday morning, that Katz had received a telephone call from an acquaintance that disappointed her, and that she left at about 11 a.m. after an argument, telling him that she intended to go to Central Park to get some sun. Bierenbaum repeated that he had remained in the apartment all day until 5:30 p.m., when he left for the family party in New Jersey, arriving there at approximately 6:30 p.m. He returned from New Jersey at approximately midnight. He called Katz's mother to see if she had heard from Katz, and went to bed. The next morning he went to work, and that evening reported Katz missing.

The police searched for Katz between her apartment and Central Park and found no trace of her. Friends and family posted pictures of Katz in the neighborhood. Dalsass contacted several individuals whose names he had obtained from Bierenbaum or Katz's family who might have information about Katz. These included Ellen Schwartz, Francesca Beale, Katz's therapist Dr. Sybil Baran, Anthony Segalas and Kenneth Feiner.

Bierenbaum had contacted O'Malley on July 10 to inquire about the progress of the investigation. He advised O'Malley that their building doorman, Edgar, had seen Katz leave at about 11 a.m. on July 7. O'Malley met with Bierenbaum on the 13th and requested details of the previous weekend. Bierenbaum told O'Malley that he and Katz had a mild argument Friday night which continued on Saturday, whereupon Katz told him that she was going to Central Park to cool off at about 11 a.m. Bierenbaum said that he had spent some time at the apartment waiting for Katz to return, but then left at some point to visit his family in New Jersey. He said that he had called Katz's mother and two of her friends to see if she was there. When O'Malley asked him why he waited until the evening of the following day to report Katz missing, Bierenbaum stated that he felt she would return, and when she didn't friends advised him to notify the police. **42* During their second conversation, Bierenbaum told O'Malley that he had been mistaken and that the doorman thought it was another day that he had seen Katz.

Bierenbaum told O'Malley that the marriage was in bad shape and that both of them were in therapy to attempt to improve their relationship. He told O'Malley that Katz was depressed and suicidal. O'Malley asked if Bierenbaum had ever hit his wife. Bierenbaum said no. O'Malley asked if he had ever choked his wife to the point of unconsciousness, and Bierenbaum said that he didn't want to speak about that.

In July, early in the investigation, Dalsass asked Bierenbaum if he could look around the apartment. Bierenbaum said he would get back to him, but did

not. In September Dalsass finally secured permission to search Bierenbaum's apartment. Bierenbaum's attorney gave permission for the police to search for fingerprints and anything that might help them identify Katz. Although the police wished to search for any evidence that would shed light on Katz's disappearance, the investigators felt they did not have probable cause to obtain a search warrant. The search was thus limited to the scope of the permission given. This limited search was conducted on September 30; nevertheless at that time Dalsass looked around the apartment to see if he could detect any evidence that a crime had been committed there. He did not find anything.

In September 1986 Hope Martin, an investigator from the District Attorney's office, was assigned to investigate Katz's disappearance. Martin learned that Bierenbaum was a licensed pilot. She wanted to know whether Bierenbaum had flown an airplane on the day of his wife's disappearance. On October 17, 1986 she learned that Bierenbaum had rented an airplane from Mac Dan Aircraft Rental at Caldwell Airport in Fairfield, New Jersey on July 7, 1985, the day Katz disappeared. A forensic examination of the aircraft yielded no results. Forensic tests of two automobiles that Bierenbaum was driving at the time also yielded no results.

The investigation was closed in April 1987. In May 1989 a torso found washed up on a beach in Staten Island was determined by x-ray comparison to be Katz. In 1998 the investigation was reopened, and the body was exhumed and determined by DNA comparison not to be Katz. Bierenbaum was charged with murder in the second degree in an indictment

returned December 8, 1999.

C. The Evidence at Trial

In addition to the evidence detailed above, the prosecution marshaled a wealth of circumstantial evidence that, in the words of the Appellate Division, "when ... attentively review[ed] and critically assesse[d] ..., and after applying all natural and reasonable inferences," led to the "inescapable" conclusion that Bierenbaum murdered his wife on July 7, 1985, "and the evidence excludes beyond a reasonable doubt any reasonable hypothesis of innocence." *People v. Bierenbaum*, 301 A.D.2d 119, 748 N.Y.S.2d 563, 574 (N.Y.App.Div.2002). The evidence at trial was set forth in detail in the district court's February 25, 2008 opinion, and we recount below only the evidence necessary to resolve the issues presented on appeal.

1. Katz's statements

Over defense objection eleven witnesses-friends, relatives, colleagues and Katz's therapist-were permitted to testify about conversations they had with Katz between 1983 and 1985 in which she talked about the state of her marriage, her fear of Bierenbaum's temper, his controlling behavior, his threats, and an argument in **43* 1983 during which he choked her to the point of unconsciousness. Certain of these witnesses also testified that Katz told them she had received a letter from Bierenbaum's therapist warning her that Bierenbaum was a danger to her, and that Katz intended to threaten Bierenbaum with disclosure of this letter. The trial court permitted this testimony as background evidence of the state of the

marriage and Katz's state of mind, and Bierenbaum's motive, intent and identity. The trial court gave a limiting instruction to that effect after each witness's testimony and at the close of trial, and admonished the jury that they were not to take this testimony as proof that Bierenbaum had acted in accordance with the statements, or as evidence of propensity.

Hillard Wiese, Katz's cousin, testified that Katz reported to him in the fall of 1983 that she had an argument with her husband during which he had choked her to unconsciousness. This was not the first time Bierenbaum had choked her, but it was the first time that she lost consciousness. Wiese advised her to leave immediately. Katz moved out and lived for a time with her grandfather.

Alayne Katz, Katz's sister, testified that Katz had called her in the fall of 1983, extremely upset, and told her that her husband had tried to strangle her, that she lost consciousness, Bierenbaum revived her and apologized profusely. Alayne Katz testified that her sister told her about a letter she had received from Bierenbaum's psychiatrist warning her about Bierenbaum's potential for dangerousness and advising her to move out. She also testified that they had many times discussed Katz separating from her husband.

Dr. Leigh McCullough, Katz's employer in the fall of 1983, noticed bruises on Katz's neck one day. McCullough testified that Katz told her that her husband had gotten angry at her and choked her because she had been smoking a cigarette. Katz confided in McCullough that she was having difficulty in her marriage, and that she and Bierenbaum fought

a lot.

Denise Kasenbaum, a friend, testified that Katz had told her there were problems in the marriage, incidents of violence, that Bierenbaum was very controlling, and that she was not happy. Katz recounted an incident when Bierenbaum discovered her smoking a cigarette, got very angry, came at her and choked her. Katz also told Kasenbaum that she had gotten a letter from Bierenbaum's psychiatrist. Kasenbaum testified that Katz told her she was having an affair with a colleague at a hospital where she was interning. Kasenbaum saw Katz on the day before she disappeared. Katz told her that she was looking for an apartment and that she was going to tell her husband that weekend that she was leaving.

Francesca Beale, a former employer, testified that in a telephone conversation in 1983, Katz said that her husband had a terrible temper, that she was afraid of him. Katz asked Beale if she could move in with her.

Maryann DeCesare, a friend, testified that Katz told her that she was afraid of Bierenbaum's temper and that he had threatened her. Katz told DeCesare that she had gone out on the terrace of their apartment to smoke a cigarette, where he confronted her and choked her. Katz told DeCesare that she was unconscious, and that Bierenbaum had to call 9-1-1 for assistance. Often thereafter Katz would ask her for advice: would DeCesare leave her husband if he threatened to strangle her; had DeCesare's husband ever threatened to hurt her; should she leave Bierenbaum. DeCesare testified that Katz told her that Bierenbaum had threatened to kill her if she left

him. In another **44* conversation Katz told DeCesare that she and Bierenbaum had discussed the Claus von Bulow case, and that Bierenbaum had said the problem with the case was that von Bulow left evidence and that he would leave no evidence. A few days before she disappeared, Katz told DeCesare that she had met someone in whom she was interested, and she wondered if DeCesare thought it would be all right if she brought him up to the apartment when Bierenbaum wasn't there. She also told DeCesare that she thought she was being followed. In their last telephone conversation, Katz told DeCesare that she planned to ask Bierenbaum for a divorce, and that she had secretly borrowed $10,000.00 and put it in a safe deposit box to pay for a year of graduate school.

Dr. Kenneth Feiner developed a romantic relationship with Katz in the months prior to her disappearance. He testified that Katz discussed with him her wish to leave her husband, their constant fights and arguments, and one argument during which Bierenbaum put his hands to her neck. Katz told him that she was going to move in with her friend Ellen Schwartz in Connecticut.

Katz had an affair with Anthony Segalas, an investment banker, during the summer of 1984 and the spring of 1985. Segalas testified that Katz told him she was in a very unhappy marriage, that she was afraid of her husband and that he had tried to strangle her once. More recently she talked of moving in with a girlfriend in Connecticut. Segalas and Katz used cocaine together.

Dr. Yvette Feis, Katz's former professor and friend, testified that Katz told her she was looking for other

sexual partners. In 1984 Katz told her about a time in 1983 when Bierenbaum noticed her smoking a cigarette on the terrace of their apartment, became violent and began choking her. Late in 1984 or early 1985 Katz told her that she had received a letter from Bierenbaum's psychiatrist warning her that Bierenbaum posed a danger to her, and suggesting that Katz separate from him. Katz told Feis that she intended to use the letter as leverage in divorce proceedings by threatening to use it to ruin his career.

Dr. Sybil Baran, Katz's therapist, testified that Katz was afraid of Bierenbaum's anger. Katz told her about an incident, precipitated by smoking, when Bierenbaum became enraged and attempted to strangle her. In the four to six months before she disappeared she told her therapist that she was looking for an apartment so that she could separate from Bierenbaum.

Dr. Ellen Schwartz, a close friend from graduate school, testified that Katz told her she was afraid of her husband, and that she was planning to leave him soon. Katz told her that the night before she took her Graduate Record Exam, Bierenbaum choked her to unconsciousness because she smoked a cigarette.

2. The videotapes

Dr. Charles Hirsch, Chief Medical Examiner for New York City, testified that prior to the onset of rigor mortis, a dead body is "pliable." The body of a woman five feet three inches tall, weighing about one hundred ten pounds could be folded and tied into a "package" about thirty-six inches long. Hirsch also stated that a body could be "disarticulated" at the

joints, a simple process that someone trained in anatomy could accomplish in ten minutes.

There was evidence that Bierenbaum regularly carried heavy duffel bags. The jury also learned that a Cessna 172 Skyhawk, the airplane that Bierenbaum rented,*45 is a stable, easy-to-handle four passenger aircraft. An inspector for the Federal Aviation Administration testified that in his opinion a pilot could singlehandedly dispose of something from the plane without a great deal of difficulty.

Sergeant Matthew Rowley of the New York police department's Aviation Unit executed three flights in a Cessna 172 from Caldwell Airport on October 11, 2000, during the trial. Three times Rowley loaded a bag containing one hundred ten pounds of sand and rice into the plane, flew out over the ocean, and ejected the bag, each time performing a different maneuver to get the bag out of the plane. The performance was videotaped, and the jury was shown the tapes.

3. Bierenbaum's inconsistent statements

Over the years between Katz's disappearance and his trial for her murder, Bierenbaum offered various accounts of his activities and various theories concerning her whereabouts. Consistently absent from any of his accounts of his activities on Sunday, July 7, 1985 was the fact that he rented an airplane in New Jersey that afternoon and went flying. Bierenbaum gave detailed statements of his activities to both investigating officers in the days following Katz's disappearance. He lied to both officers, telling both of them that he had remained in the apartment

until approximately 5:30 p.m. when he left for the party in New Jersey. At 4:30 p.m. he was already in New Jersey, flying his rented airplane.

About three weeks after Katz disappeared, Bierenbaum began an affair with Karen Caruana, a nurse educator at Maimonides Medical Center where Bierenbaum was a surgical resident. The affair began while Bierenbaum was vacationing in South Hampton on Long Island during the month of August, and lasted about six weeks. During that period Caruana and Bierenbaum discussed Katz's disappearance. Caruana testified that Bierenbaum told her that his apartment and car had been searched and that he was clean as far as any police investigation was concerned. She stated that he told her this before the end of September. At that time the police had not searched his apartment or car.

Bierenbaum told Caruana that he had hired a private investigator who had found evidence that Katz was in California. To the owner of Bierenbaum's vacation rental property in South Hampton, he speculated that Katz had a drug problem and that she had disappeared with drug dealers. He told another renter that he had gone looking for Katz in Central Park, found her towel and suntan lotion, but she was gone.

Bierenbaum told Katz's friend Ellen Schwartz that he had spoken with Katz's therapist Dr. Baran, who had told him that Katz was very depressed and she was concerned that Katz might hurt herself. Dr. Baran denied that she'd had such a conversation with Bierenbaum and denied that Katz was suicidal. Two or three months later Bierenbaum told another of

Katz's friends, Maryann DeCesare, that he thought she was waitressing by a seaside community. DeCesare said that Bierenbaum often mentioned water, that Katz was "outside cooling off."

Dr. Roberta Karnofsky, an anesthesiologist, had a year-long relationship with Bierenbaum beginning in fall 1985, while she was a medical student under his supervision. He told Karnofsky that he had gotten into an argument with his wife one day, that she went to cool off in Central Park, that she had been seen one time around the area of Central Park, but had never been seen again. To Karnofsky Bierenbaum speculated that Katz was in a "fugue state" or that she had run off with **46* someone to the Caribbean. Bierenbaum told Karnofsky that the police had asked him if he had removed the apartment rug or had it cleaned, and that he had answered that he had not. Katz's friend Yvette Feis was in the apartment several days after Katz was reported missing, noticed that the living room rug was gone and asked about it. Bierenbaum told Feis that the cats had fouled the rug and that he was having it cleaned.

Dr. Stephanie Youngblood, a chiropractor who lived with Bierenbaum from 1990 to 1993, testified that Bierenbaum told her that Katz had a drug problem, was having extramarital affairs, and that he felt her death was drug-related: "[h]e felt she went to Central Park to hang out with her druggie friends."

4. Bierenbaum's defense

The defense called one witness, Joel Davis. Davis had been in a bagel shop in Manhattan on Second Avenue in the '80's on the afternoon of July 7, 1985,

and he noticed an attractive woman wearing a distinctive t-shirt with a non-English word on it. When two weeks later he saw posters of Katz, he identified her as the woman he had seen, and he called the police. He described her to the jury as deeply tanned, about five foot one, with a well-developed body. On cross-examination Davis admitted that he had told an investigator for the defense that the woman he'd seen was tall and statuesque, and explained that he had confused his description of the missing woman by likening her to two different women, one tall with her face and one short with her body.

The prosecution called Katz's sister Alayne as a rebuttal witness. She provided a picture of Katz from the summer of 1985, and described her as less than five foot three, weighing approximately 110 pounds, with an A-cup bra size.

D. Post-Trial Proceedings

On appeal to the Appellate Division, First Department, Bierenbaum argued that his guilt was not proven beyond a reasonable doubt. He also argued, among other issues, that the trial court erroneously (1) allowed the jury to learn of the existence and nature of the letter written to Katz by Bierenbaum's psychiatrist warning her of the danger Bierenbaum posed to her; (2) allowed various people to testify about Katz's verbal statements to them describing Bierenbaum's threatening remarks and behavior; and (3) permitted the jury to watch the videotaped demonstration showing how a pilot flying solo may load a duffel bag containing a 110-pound body into a Cessna 172 airplane, fly over the ocean

and eject the bag.

The Appellate Division rejected these claims and affirmed the conviction on October 22, 2002. *See* *Bierenbaum*, 748 N.Y.S.2d at 589. Leave to appeal to the New York Court of Appeals was denied on March 10, 2003. *See* *People v. Bierenbaum*, 99 N.Y.2d 626, 760 N.Y.S.2d 107, 790 N.E.2d 281 (2003). Bierenbaum's petition for a writ of certiorari to the United States Supreme Court was denied on October 6, 2003. *See* *Bierenbaum v. New York*, 540 U.S. 821, 124 S.Ct. 134, 157 L.Ed.2d 40 (2003).

After Bierenbaum's direct appeal was concluded, he filed a motion with the trial court to set aside the judgment on the grounds that trial and appellate counsel had rendered ineffective assistance of counsel. The motion was denied on September 6, 2005, and leave to appeal was denied on January 12, 2006. Bierenbaum then filed a petition for writ of error *coram nobis* in the Appellate Division contending that appellate counsel had provided ineffective assistance. The petition was denied on March 9, 2006. Leave to appeal ***47** that decision to the New York Court of Appeals was denied on May 30, 2006. *See* *People v. Bierenbaum*, 6 N.Y.3d 892, 817 N.Y.S.2d 627, 850 N.E.2d 674 (2006).

On March 17, 2006, Bierenbaum filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 in the United States District Court for the Southern District of New York. In his petition he alleged that he was denied his Sixth Amendment right to effective assistance of counsel, and that admission of numerous hearsay statements violated his Sixth Amendment right to confront witnesses against him. He requested

an evidentiary hearing. On February 25, 2008, the district court denied the petition without conducting an evidentiary hearing. *See* Bierenbaum v. Graham, No. 06 Civ. 2120, 2008 WL 515035 (S.D.N.Y. Feb.25, 2008). This Court granted a certificate of appealability on September 23, 2008.

II. Discussion

A. Standard of Review

We review de novo a district court's decision to deny a petition for a writ of habeas corpus. *E.g.*, Henry v. Ricks, 578 F.3d 134, 137 (2d Cir.2009). We may not consider a state prisoner's application for a writ of habeas corpus unless the applicant has exhausted available state remedies by "fairly present[ing] his claim in each appropriate state court (including a state supreme court with powers of discretionary review)." Baldwin v. Reese, 541 U.S. 27, 29, 124 S.Ct. 1347, 158 L.Ed.2d 64 (2004) (internal quotation marks omitted); *accord* Georgison v. Donelli, 588 F.3d 145, 153 (2d Cir.2009); *see* 28 U.S.C. § 2254(b)(1)(A). " 'A petitioner has fairly presented his claim only if he has informed the state court of both the factual and the legal premises of the claim he asserts in federal court.' " Jones v. Keane, 329 F.3d 290, 294-95 (2d Cir.2003) (internal quotation marks omitted) (quoting Dorsey v. Kelly, 112 F.3d 50, 52 (2d Cir.1997)).

If a state court decision "rests on a state law ground that is independent of the federal question and adequate to support the judgment," Coleman v. Thompson, 501 U.S. 722, 729, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991), we will not review the issue. *See*

Richardson v. Greene, 497 F.3d 212, 217 (2d Cir.2007). "The rule applies with equal force whether the state-law ground is substantive or procedural." *Lee v. Kemna*, 534 U.S. 362, 375, 122 S.Ct. 877, 151 L.Ed.2d 820 (2002). A "state law ground is only adequate to support the judgment and foreclose review of a federal claim if it is 'firmly established and regularly followed' in the state," and application of the rule would not be "exorbitant." *Garvey v. Duncan*, 485 F.3d 709, 713-14 (2d Cir.2007) (quoting *Lee*, 534 U.S. at 376, 122 S.Ct. 877).

When a state court has adjudicated the merits of a petitioner's claim, a federal court may grant an application for a writ of habeas corpus only if "the adjudication of the claim-(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d); *see also, e.g., Brown v. Alexander*, 543 F.3d 94, 100 (2d Cir.2008). Under § 2254(d)(1), a state-court decision is contrary to clearly established Supreme Court precedent if its "conclusion on a question of law is 'opposite' to that of the Supreme Court or if the state court decides a case differently than the Supreme Court's decision 'on a set of materially indistinguishable*48* facts.' " *Id.* (quoting *Williams v. Taylor*, 529 U.S. 362, 413, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000)). A state court decision involves an unreasonable application of clearly established Supreme Court precedent if it correctly identifies the governing legal principle but unreasonably applies or unreasonably refuses to

extend that principle to the facts of a particular case. *See* Williams, 529 U.S. at 413, 120 S.Ct. 1495; *Ramdass v. Angelone*, 530 U.S. 156, 166, 120 S.Ct. 2113, 147 L.Ed.2d 125 (2000); *accord Kennaugh v. Miller*, 289 F.3d 36, 45 (2d Cir.2002).

A state court's determination of a factual issue is presumed to be correct, and may only be rebutted by clear and convincing evidence. 28 U.S.C. § 2254(e)(1); *see Drake v. Portuondo*, 553 F.3d 230, 239 (2d Cir.2009).

B. Exhaustion

The district court determined that Bierenbaum failed to exhaust his state court remedies with regard to his Confrontation Clause claim, finding that he did not argue the claim in his application for leave to appeal to the New York Court of Appeals. The respondents argued this position below, but on further review have withdrawn their argument, agreeing with Bierenbaum that he presented his constitutional claim in his letter brief submitted to the New York Court of Appeals on December 10, 2002.

On appeal to the Appellate Division, First Department, Bierenbaum presented, among other questions, the following: "Whether Dr. Bierenbaum was denied a fair trial by the improper admission of widespread testimony recounting statements purportedly made by Ms. Bierenbaum, which did not satisfy any hearsay exception or the confrontation clause of the state and federal constitutions ... ?" Similarly, in his letter seeking leave to appeal to the New York Court of Appeals, he argued that leave should be granted "to review the admissibility of

background evidence through hearsay declarations, whether in 'domestic violence' cases or otherwise, and to consider whether admission of such evidence denies a defendant his state and federal rights of confrontation."

The Appellate Division did not explicitly address Bierenbaum's confrontation clause claim,[FN1] and the

FN1. At the close of its opinion, the Appellate Division disposed of the arguments it did not address as follows: "We have examined defendant's remaining contentions and find them unavailing." *Bierenbaum*, 748 N.Y.S.2d at 589.

Court of Appeals denied leave to appeal without explanation. " '[T]he question of whether a federal constitutional question was sufficiently asserted in state courts to form the basis of a federal habeas petition is ... a question of federal law which the federal courts must resolve for themselves.' " *Acosta v. Artuz*, 575 F.3d 177, 185 (2d Cir.2009) (quoting *DiSimone v. Phillips*, 461 F.3d 181, 189 (2d Cir.2006)). A state prisoner may fairly present to the state courts the constitutional nature of his claim by "claim[ing] the deprivation of a particular right specifically protected by the Constitution." *Daye v. Att'y Gen. of the State of N.Y.*, 696 F.2d 186, 193 (2d Cir.1982) (en banc). Here, Bierenbaum expressly invoked the Confrontation Clause to both appellate courts. "[T]o qualify as an adjudication 'on the merits,' a state court decision need not mention a particular argument or explain the reasons for rejecting it." *Dallio v. Spitzer*, 343 F.3d 553, 560 (2d Cir.2003); *see also Brown v. Artuz*, 283 F.3d 492, 498 (2d Cir.2002) (finding that Sixth Amendment claim was adjudicated

on the merits when state court dismissed it by stating "defendant's*49 remaining contentions are without merit."). We therefore conclude that the state courts were fairly alerted to the constitutional claim, Bierenbaum has exhausted his available state remedies with respect to the claim, and we may reach the merits of the claim. *See* Galdamez v. Keane, 394 F.3d 68, 78 (2d Cir.2005) (reaching the merits of petitioner's confrontation clause claim where briefs and leave application, fairly construed, raised the issue).

C. Confrontation Clause

The Confrontation Clause of the Sixth Amendment to the United States Constitution states: "in all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him." U.S. Const. amend. VI. Throughout Bierenbaum's trial and the direct appeal of his conviction, the admission of statements by a declarant not present at trial was governed by *Ohio v. Roberts*, 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980), *abrogated by* *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). Under *Roberts*, the statements of an unavailable hearsay declarant were "admissible only if [they bore] adequate 'indicia of reliability,' " which could be satisfied by demonstrating that the evidence fell "within a firmly rooted hearsay exception," or that the evidence had "particularized guarantees of trustworthiness." 448 U.S. at 66, 100 S.Ct. 2531.

The United States Supreme Court decisions in *Crawford* and *Davis v. Washington*, 547 U.S. 813, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006), confined the scope

of the Confrontation Clause to testimonial statements. *See Davis*, 547 U.S. at 824, 126 S.Ct. 2266 (holding that limiting the Confrontation Clause to testimonial hearsay is "clearly reflected in the text of the constitutional provision"); *United States v. Feliz*, 467 F.3d 227, 232 (2d Cir.2006) ("[A]fter *Crawford* and *Davis*, ... the inquiry under the Confrontation Clause is whether the statement at issue is testimonial."); *accord United States v. Williams*, 506 F.3d 151, 156 (2d Cir.2007). Nontestimonial statements therefore do not implicate the Confrontation Clause. *See Feliz*, 467 F.3d at 232.

Bierenbaum argues that the challenged statements were inadmissible under either the *Roberts* or the *Crawford* and *Davis* standard: that the statements were admitted for their truth, that no hearsay exception applied, that the statements showed no particularized guarantees of trustworthiness, and that the statements were testimonial.

In *Whorton v. Bockting*, 549 U.S. 406, 421, 127 S.Ct. 1173, 167 L.Ed.2d 1 (2007), the Supreme Court held that *Crawford* announced a new rule that would not apply retroactively on collateral review. Moreover, a federal court must apply the clearly established "Supreme Court jurisprudence as of either the date of the pertinent state court 'adjudicat[ion] on the merits,' or the date when the state court conviction became final." *Mungo v. Duncan*, 393 F.3d 327, 333-34 (2d Cir.2004). As of 2002 when his claim was adjudicated on the merits, and 2003 when his conviction became final, *Ohio v. Roberts* governed his claim. Thus, Bierenbaum's challenge to the admission of Katz's statements must be evaluated under *Roberts*.

Assuming that Katz's statements were admitted for the truth of the matters asserted,[FN2] they meet the *Roberts* standard ***50** for admissibility. The Appellate Division analyzed the reliability of the challenged statements under the rule for determining reliable hearsay set forth by the New York Court of Appeals in *Nucci v. Proper*, 95 N.Y.2d 597, 721 N.Y.S.2d 593, 744 N.E.2d 128 (2001):

FN2. Respondents assert in the alternative, and the district court agreed, that with one exception the statements were not admitted for their truth. We need not address this argument because of our disposition of this issue under *Roberts*.

Reliability is the sum of the circumstances surrounding the making of the statement that render the declarant worthy of belief. Relevant factors include spontaneity, repetition, the mental state of the declarant, absence of motive to fabricate, unlikelihood of faulty recollection and the degree to which the statement was against the declarant's interest. Courts have also considered the status or relationship to the declarant of the person to whom the statement was made, whether there was a coercive atmosphere, whether it was made in response to questioning and whether the statements reflect an attempt to shift blame or curry favor. *Id.*, 721 N.Y.S.2d 593, 744 N.E.2d at 131 (citations, internal quotation marks and ellipses omitted). The Appellate Division ruled that the statements bore numerous hallmarks of reliability:

She was speaking spontaneously; she repeated the statements separately to various people in her life;

her statements about the troubled side of their marriage were a natural consequence of corroborated facts about their marriage; she was, by all indications, in good mental health; there appears no reason for her to have fabricated the matters she discussed at the time of her utterances; and her statements largely concerned private matters that some would be embarrassed or otherwise reluctant to disclose. Furthermore, the statements were made mostly to those close to her, in contexts completely devoid of coercion, not in response to anyone's questioning, nor under circumstances at all suggestive of any attempt to curry anyone's favor. *Bierenbaum*, 748 N.Y.S.2d at 583-84. It was not unreasonable for the Appellate Division to conclude that the reliability of Katz's statements was "amply supported." *Id.* at 583. Indeed, Bierenbaum does not argue to this Court (except parenthetically) that the challenged hearsay declarations were in fact unreliable. The passage quoted above demonstrates that the Appellate Division found particularized guarantees of trustworthiness in the challenged statements. This conclusion was neither contrary to nor an unreasonable application of the Supreme Court's Confrontation Clause precedent in 2002 and 2003.

D. Ineffective Assistance of Counsel

To show ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), Bierenbaum " 'must (1) demonstrate that his counsel's performance fell below an objective standard of reasonableness ... and (2) affirmatively prove prejudice arising from counsel's allegedly deficient representation.' " *Brown v. Greene*, 577 F.3d 107, 110 (2d Cir.2009) (quoting *Carrion v.*

Smith, 549 F.3d 583, 588 (2d Cir.2008)). To satisfy the first part of the test-performance-he must "show[ ] that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland*, 466 U.S. at 687, 104 S.Ct. 2052. The *Strickland* standard is "rigorous," *Bell v. Miller*, 500 F.3d 149, 155 (2d Cir.2007):

> Judicial scrutiny of counsel's performance must be highly deferential [;] ... every effort [must] be made to eliminate the distorting effects of hindsight, to ***51** reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time.... [A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy.

Strickland, 466 U.S. at 689, 104 S.Ct. 2052 (citations and internal quotation marks omitted).

To satisfy the second part of the *Strickland* test-prejudice-Bierenbaum "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.*, 466 U.S. at 694, 104 S.Ct. 2052. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*

Bierenbaum lists nine errors that he contends are objectively unreasonable: (1) failing to move to dismiss the indictment due to pre-trial delay; (2)

conceding that Katz died on July 7, 1985; (3) "opening the door" to testimony and argument that Dr. Bierenbaum and his lawyer refused to consent to a forensic search of his apartment; (4) failing to call two witnesses who allegedly would have supported his claim that Katz left the apartment on the morning of July 7; (5) failing to cross-examine effectively a witness who minimized his use of cocaine with Katz; (6) failing to object to the admission of the videotaped demonstration of the prosecution's theory of how Bierenbaum disposed of his wife's body; (7) failing to move for a trial order of dismissal on the grounds of insufficient evidence of the element of intent to kill; (8) failing to make a timely objection to improper remarks in summation; (9) failing to request a jury charge on jurisdiction.

1. Pre-Indictment Delay

Defense counsel did not move to dismiss the indictment for undue delay. "Oppressive" prosecutorial delay may violate the Due Process Clause of the United States Constitution. *See* *United States v. Lovasco*, 431 U.S. 783, 789, 97 S.Ct. 2044, 52 L.Ed.2d 752 (1977). To prevail on such a claim under federal law, Bierenbaum must prove that the delay resulted in actual prejudice and that the prosecution's reasons for the delay were improper. *United States v. Langella*, 776 F.2d 1078, 1083 (2d Cir.1985) (citing *Lovasco*, 431 U.S. at 790, 97 S.Ct. 2044); *accord* *United States v. Cornielle*, 171 F.3d 748 (2d Cir.1999).

Under New York law, the prosecution must establish good cause for extended delay, but " 'a determination made in good faith to delay prosecution for sufficient reasons will not deprive defendant of due

process even though there may be some prejudice to defendant.' " *People v. Decker*, 13 N.Y.3d 12, 884 N.Y.S.2d 662, 912 N.E.2d 1041, 1042 (2009); *see* N.Y. Const. art. I, § 6. "[I]n a proper case, a lengthy and unjustifiable delay in commencing the prosecution may require dismissal even though no actual prejudice to the defendant is shown." *People v. Singer*, 44 N.Y.2d 241, 405 N.Y.S.2d 17, 376 N.E.2d 179, 186 (1978). In determining whether prosecution has been unduly delayed, a New York court will balance five factors:

"(1) the extent of the delay; (2) the reason for the delay; (3) the nature of the underlying charge; (4) whether or not there has been an extended period of pretrial incarceration; and (5) whether or not there is any indication that the defense has been impaired by reason of the delay."

Decker, 884 N.Y.S.2d 662, 912 N.E.2d at 1043 (quoting *People v. Taranovich*, 37 N.Y.2d 442, 373 N.Y.S.2d 79, 335 N.E.2d 303, 306 (1975)).

Bierenbaum argued undue pre-indictment delay to the state court in his motion to set aside the judgment. The state court weighed the five *Taranovich* factors and concluded that if defense counsel had moved to dismiss the indictment, the motion would unquestionably have been denied. Although the delay was substantial, Bierenbaum suffered no prejudice, and he was not incarcerated prior to trial. Given the seriousness of the charge, the circumstantial nature of the evidence, and no evidence of any improper motive on the part of the prosecution, the motion had no chance of success.

The state court concluded therefore that defense counsel was not ineffective for failing to move to dismiss for pre-indictment delay. Had defense counsel moved to dismiss the indictment, the motion would not have been granted, and therefore there was no reasonable probability that the outcome-proceeding to trial-would have been different. The state court's conclusion was a reasonable application of *Strickland.*

2. Defense Counsel's Concession

Trial counsel conceded in his opening statement that Katz died on July 7, 1985: "[L]et's talk about some things that are not at issue here. First of all, it is not disputed by us that Gail Katz Bierenbaum is dead. That is not disputed. Not only that's not disputed by us, but that she likely died some time on July 7, 1985." Trial Tr. vol. I, 1881, Oct. 2, 2000. In discussing the evidence he also stated

Now we will tell you that the evidence will also show that she is dead. She should have made her appointments, she should have been where she said she would be and she could have come home but she didn't and that's why we can tell you that she is dead. *Id.* at 1884-85.

Bierenbaum argues that even if it were within the range of reasonable strategic choices to concede that Katz was dead, it was not reasonable to concede that she died on the Sunday she disappeared. We disagree. With the benefit of hindsight, conceding that Katz died on July 7 may seem extraordinary, but at the time counsel would have had reason to believe that the jury was likely to hear from several reliable

sources that she had appointments for the next day, and that she would have kept those appointments if she could have. Counsel's theory was that Katz left the apartment on Sunday, and met with foul play after she left. It was consistent with that theory to concede her death on July 7. It was not objectively unreasonable to do so. Moreover, it was a reasonable trial strategy to establish a forthright relationship with the jury, by conceding what the defense did not have evidence to contest.

3. Opening the Door

In his opening statement counsel told the jury "You will also learn that the police conducted a forensic examination of the doctor's apartment, the doctor's car, his friend's car that he borrowed some time that weekend, the airplane and found no evidence of blood or any other biological determinations ... because ... this case also turns on the lack of evidence." *Id.* at 1889. In fact, the police were not permitted to conduct a forensic search of the apartment.

The prosecution successfully argued that counsel had "opened the door" to allow testimony from Detective Dalsass that Bierenbaum's attorney had prevented the police from conducting a warrantless forensic search of the apartment. Dalsass ***53** testified that Bierenbaum's attorney gave permission for the police to conduct a limited search for items that might help to identify Katz. Prior to that date he had not been permitted to enter the apartment. He stated that he nevertheless attempted to look for any evidence that a crime had been committed in the apartment, that he discovered no such evidence, but that he had not conducted a detailed forensic search.

The prosecution also produced the testimony of Karen Caruana, a woman with whom Bierenbaum had a brief affair shortly after Katz disappeared. Caruana testified that Bierenbaum told her in August or September that his apartment had been searched and that the police had cleared him.

In summation the prosecution argued that [Bierenbaum] tells Karen Caruana, "You know the cops searched my apartment. They found nothing, I've been cleared," and in the time frame we're talking about it's clear that he's telling Karen Caruana that the cops have cleared him before they've even been inside his apartment.... Cops hadn't searched anything yet. One of the main reasons is because the defendant wouldn't let them search the apartment. The defendant and his attorney stopped the cops from doing a complete forensic search on the apartment. Ladies and gentlemen, eyeballing the bathtub and walking around the apartment are no substitute for a complete forensic search ..."

Trial Tr. vol. IV, 3212, Oct. 23, 2000. Defense counsel made no contemporaneous objection, but after the summation and before the jury charge he moved for a mistrial on that and other grounds. The trial judge denied the motion, but offered to tell the jury that Bierenbaum had no legal obligation to allow a search of his apartment, that he had a right to act on advice of counsel, and that the jury should draw no negative inference from that; but that in fact the apartment was not fully searched. Counsel accepted the offer and the trial judge instructed the jury:

Let me also state that the defendant had no legal obligation to allow the police to search his apartment at any point, but-and certain evidence came out concerning a search of his apartment. Your recollection controls. That involved advice of counsel. I want to remind you that every individual has a right to an attorney and you can draw no negative inference from the fact that someone hires an attorney. *Id.* at 3259.

Bierenbaum argues that the Dalsass testimony was inadmissible absent defense counsel's remark, and the prosecution could not therefore have used it in summation. Again, we disagree. Although defense counsel mistakenly referred to the search of Bierenbaum's apartment as a forensic search, omitting the term "forensic" from counsel's opening statement would not have prevented the prosecution from eliciting Dalsass's testimony that a limited search of the apartment was conducted several weeks after Katz disappeared. A strong piece of the defense was the fact that there was no physical evidence to link Bierenbaum to the crime. Bierenbaum does not suggest that counsel should not have stressed the lack of evidence, or should not have mentioned that searches of the apartment, cars and airplane turned up nothing. ("This case ... turns on the lack of evidence.") In order to put the absence of physical evidence in context, the prosecution would have been permitted to inform the jury that the police were constrained to a limited search of the apartment several weeks after the disappearance. Regardless of defense counsel's**54* error in referring to the search as a "forensic search," the prosecution would also have elicited the fact that Bierenbaum lied to Caruana about the search.

In summation the prosecution improperly argued that Bierenbaum and his attorney prevented the police from conducting a complete search. When the trial court's attention was drawn to this error, it refused to order a mistrial, but offered an instruction, admonishing the jury that it could draw no negative inference from an individual's acting on advice of counsel. Defense counsel did not object to the instruction or request a stronger one. Moreover, at that point in the summation, the prosecuting attorney was cataloguing what he termed Bierenbaum's lies-to Dalsass, to O'Malley, to Caruana, and several other witnesses. He did not focus on Bierenbaum's having prevented a forensic search. Given that the testimony was independently admissible, and the trial court gave a curative instruction in connection with the improper closing argument, defense counsel's mistaken reference to a forensic search did not "open the door" to prejudicial comments.

4. Failing to call two witnesses

Defense counsel did not call two individuals whom Bierenbaum contends witnessed Katz leaving the apartment and the building in accordance with his narrative of events on July 7, 1985. June Sherman lived directly below the Bierenbaum apartment. According to her affidavit, she was acutely aware of Katz, who frequently screamed at her husband and walked around noisily in high-heeled shoes. She states that on the morning Katz disappeared, Katz was screaming at someone. Sherman heard the noise of the high-heeled shoes, then she heard the door slam, and both the shouting and the sound of high

heels on the floor stopped. She heard nothing more. Sherman believed that Katz left the apartment when the door slammed.

During the trial defense counsel unsuccessfully attempted to serve Sherman, who had moved to Arizona. Bierenbaum faults the district court for concluding that counsel's efforts to secure her testimony were diligent, and concluding that failure to present her testimony did not prejudice the defense.

Regardless of whether counsel's performance was deficient in failing to secure Sherman's testimony, Bierenbaum cannot show prejudice. Sherman's testimony would not have undermined confidence in the jury's guilty verdict. Sherman would have testified that she believed Katz left the apartment after the door slammed. She would have had to admit that she did not see Katz leave, nor could she be sure that the door was the exterior door, rather than an interior door. The prosecution would have argued that even if the jury believed Sherman was testifying truthfully about what she heard, her testimony was consistent with the prosecution's theory that Bierenbaum killed his wife in the course of an explosive argument.

Pablo Alvarez was employed at the apartment building in 1985. One of his duties was to relieve the doorman at lunchtime. According to his affidavit, on the Sunday before Katz's parents and the police inquired about her, he relieved the doorman, Edgar Rivera, at approximately 11:30 a.m. At that time he saw Katz leave the front entrance of the building wearing shorts and a t-shirt. He did not see her return.

Defense counsel decided not to call Alvarez. The decision not to do so was a defensible trial strategy. Bierenbaum does not dispute that Alvarez told the authorities in July 1985 that he did not recall **55* seeing Katz on July 7, and that he did not remember how she was dressed the last time he did see her. Bierenbaum contends that even if Alvarez's recollection was "shaky," his testimony was essential to counter the prosecution's argument that Bierenbaum lied when he told Detective O'Malley that a doorman named Edgar had seen Katz leave the building.

Detective O'Malley testified that in their first conversation Bierenbaum told him that a doorman named Edgar had seen Katz leave the building on July 7. When O'Malley followed this up in a second conversation, Bierenbaum said that Edgar was now not sure whether he'd seen her on that or another day. Edgar Rivera told the police that he did not remember seeing Katz on July 7. When Rivera testified at trial, he stated that he could not remember anything about July 7, 1985.

Had the defense called Alvarez, and had he testified in accordance with his affidavit, the jury would have been presented with the testimony of the relief doorman, who remembered not only the departure of a particular tenant, but what she was wearing on an unremarkable Sunday fifteen years before the trial. They would have to have ignored the fact that when asked about that Sunday fifteen years ago, Alvarez, like Rivera, did not recall seeing Katz leave the building.

Under the circumstances, it was reasonable for defense counsel not to call Alvarez. Rivera's testimony was not particularly damaging to Bierenbaum's case. Detective O'Malley testified that Bierenbaum told him he'd made a mistake, and that Rivera wasn't sure when he'd seen Katz. The prosecution did argue in summation that Bierenbaum lied about the doorman, but the thrust of the argument was that Bierenbaum never spoke with Rivera at all in the days after Katz's disappearance.[FN3] The Alvarez testimony, if believed, would not have countered this argument, as Alvarez did not claim that he'd mentioned his sighting of Katz to Bierenbaum, or anyone else, during this period.

FN3. Although there was no evidence to that effect, defense counsel did not object.

" 'The decision not to call a particular witness is typically a question of trial strategy.' " *Greiner v. Wells*, 417 F.3d 305, 323 (2d Cir.2005) (quoting *United States v. Luciano*, 158 F.3d 655, 660 (2d Cir.1998) (per curiam)). The decision not to call Alvarez was "within the range of acceptable strategic and tactical alternatives." *Luciano*, 158 F.3d at 660.

5. Failure to cross-examine witness Anthony Segalas concerning Katz's use of cocaine

Anthony Segalas testified at trial that he and Katz used cocaine together twice. In 1985 Segalas had told Detective Dalsass that he and Katz used cocaine on numerous occasions. The police report also stated that Katz phoned Segalas in June 1985 and asked him to examine some cocaine she had bought, because she

thought she had received a short amount.

Bierenbaum faults defense counsel for failing to impeach Segalas with his prior statements, claiming that this damaged the defense theory that Katz's drug usage and risky behavior may have led to her disappearance. Counsel suggested in his opening statement that "You will also learn ... that she had a drug issue and you will learn ... at least one of the lovers Gail Katz Bierenbaum took behind Dr. Bierenbaum's back was also someone she shared drugs with, and you will learn it from his own testimony." Trial Tr. vol. I, 1889.

In summation, counsel attacked the prosecution's use of the videotapes that showed how a body could have been loaded into an airplane and dropped into the sea, asserting that the videotapes did not supply proof of what happened to Katz. Directly following this argument he alluded to the films "Panic in Needle Park," and "Looking for Mr. Goodbar," and suggested, in a similar vein, that these movies did not prove that Katz's drug use and risky behavior were connected to her death. Later in his summation, he returned to the drug-related disappearance theory:

... Segalas-they did a little bit, what they thought was cocaine that was left in the house. Was she killed by drug dealers? That is one of the theories that could have happened. It is possible. Segalas said she is the one who made the connection. It is not the first time an innocent drug buyer gets killed in the course of a drug deal.... It was a different city then, a dangerous place, Gail Katz Bierenbaum may very well have found by virtue of some of her own behavior danger. Trial. Tr. vol. IV, 3142.

Had the defense gotten Segalas to admit that he and Katz used cocaine on several occasions, the defense suggestion that she may have been killed by drug dealers would still have been plagued by lack of evidence, as the state court noted. The defense, knowing that the alternate scenarios for Gail Katz's death had little in the way of factual support, apparently chose to cast all of the scenarios-the prosecution's included-as merely theories, which could not be proven beyond a reasonable doubt. For this strategy, the defense had no particular need to elicit evidence that Katz was a regular as opposed to occasional user. Even a neophyte could have "found ... danger." Pressing the point on cross-examination risked alienating the jury for no particular strategic gain.

The state court's determination that the cross-examination of Segalas was not constitutionally deficient was not an unreasonable application of *Strickland.*

6. Failure to properly object to the admission of the videotaped demonstration

On direct appeal, Bierenbaum contended that the trial court erroneously admitted videotapes, demonstrating how a pilot can, without assistance, place a flight bag loaded with one hundred ten pounds of weight into a Cessna 172, fly the plane over the ocean and push it out. The Appellate Division found the error unpreserved, and declined to review it.

When the prosecution gave notice during trial that it had provided copies of the videotapes to the defense, counsel stated "I suspect we'll object." The trial judge responded "And I suspect I'll allow it." Trial Tr. vol. III, 2820, Oct. 12, 2000. The videotapes were subsequently offered into evidence without objection. The Appellate Division held that Bierenbaum had not effectively protested the admission of the videotapes under New York's preservation rule, which " 'require[s], at the very least, that any matter which a party wishes the appellate court to decide have been brought to the attention of the trial court at a time and in a way that gave the latter the opportunity to remedy the problem and thereby avert reversible error.' " *Richardson v. Greene*, 497 F.3d 212, 218 (2d Cir.2007) (quoting *Garcia v. Lewis*, 188 F.3d 71, 78 (2d Cir.1999)); *see* N.Y.Crim. Proc. Law § 470.05[2].

Bierenbaum now argues that his counsel was ineffective for failing to properly object to the admission of the videotapes. He contends that the videotapes lacked any foundation in the evidence and were ***57** based on speculation. On that point we agree with the Appellate Division, the post-judgment motion court and the district court "that the contents of the videotape[s] depict a scenario that was anything but speculation. Rather, the tape's contents clearly demonstrate the feasibility of the People's theory of this case, a theory which all of the circumstantial proof together overwhelmingly shows." *Bierenbaum*, 748 N.Y.S.2d at 589 (dictum). Given that the videotapes were neither speculative nor lacking in foundation, counsel was not ineffective for failing to object to their admission on that basis.

7. Failure to move for dismissal on the ground of insufficient evidence of specific intent to kill

At the close of the prosecution's case, defense counsel "move [d] for a trial order of dismissal of the single count of the indictment" because "the People failed to establish every element of the crime charged [,] and this case particularly in ... its circumstantial nature is insufficient to go forward for a jury resolution." Trial Tr. vol. IV, 3009-10, Oct. 18, 2000. Following the close of evidence, counsel "move[d] to dismiss the indictment ... on the basis that the People have failed to prove their case beyond a reasonable doubt and to the legal standard required for the case to go to the jury." *Id.* at 3107, Oct. 23, 2000.

Under New York law, "[a] person is guilty of murder in the second degree when ... [w]ith intent to cause the death of another person, he causes the death of such person...." N.Y. Penal Law § 125.25[1]. A trial court may issue a trial order of dismissal as to any count of an indictment on "the ground that the trial evidence is not legally sufficient to establish the offense charged." N.Y.Crim. Pro. Law § 290.10[1]. Under New York law, a motion to dismiss for insufficient evidence must "be specifically directed at the alleged error." *People v. Gray*, 86 N.Y.2d 10, 629 N.Y.S.2d 173, 652 N.E.2d 919, 921 (1995) (internal quotation marks omitted).

Bierenbaum claims that his counsel was ineffective because his motions did not specify that he was challenging the element of intent to kill, and that therefore he could not seek review of this claim on direct appeal.

Although on this record the Appellate Division could have found a claim of lack of intent to kill unpreserved, it addressed the legal sufficiency of both elements of second degree murder: "The People proved beyond a reasonable doubt that this defendant had the opportunity, the motive, and the intent to kill his victim, and that it was he who did so." *Bierenbaum*, 748 N.Y.S.2d at 579. Given that the Appellate Division reviewed the claim that the evidence was legally insufficient to prove that Bierenbaum intended to cause Katz's death, he cannot claim that counsel was ineffective in failing to preserve the issue for appeal.

8. Failure to object to summation remarks

Bierenbaum faults his trial counsel for failing to object when the prosecution argued in summation that Bierenbaum allowed an argument to "get explosive" and choked Katz as he had done before, only this time to her death. [FN4] He argues ***58** that the statements invited the jury to consider the 1983 choking incident as evidence of propensity, and that there was no evidence that Katz died by strangulation or that Bierenbaum stood over her as she died.

... He knew in July of 1985, what it would take to render her unconscious. He'd done it in the past. He knew in July of 1985, what it would take to kill her. He didn't stop when he knew he was hurting her. He didn't stop when he knew she was unconscious. He only stopped when she was dead.... We think about the intimacy of strangulation. How close up you are with a person that you are choking.... Strangulation is up close and personal. You watch as it literally squeeze[s] the life out of another human being. Think

about the defendant. His anger at his wife. Think about him looking at her while he squeezes the life out of her. Think about him standing over Gail Katz as she feels and he watches the life ebbing from her body. Now, you know what his intent was. Trial Tr. vol. IV, 3194, 3227-28.

Although trial counsel made no contemporaneous objection to the summation, before the jury was charged he moved for a mistrial on this and other

FN4. The prosecution argued:

What does he do? He does not ... tr[y] to defuse the situation. He lets it get explosive and as he has done before, as only he has done before, he places his hands around her neck and begins to choke her. But he chokes her much harder than he'd done when she was only having a cigarette. Chokes her much harder than when he had only strangled her to unconsciousness. He chokes her to death.grounds.

FN5 The trial court denied the motion, finding that the prosecution had not argued propensity, but that the incident was probative of other issues in the case, particularly intent. The trial court also thereafter advised the jury:

... I have allowed the People to introduce evidence that on another occasion this defendant committed a prior, what we call legally ["]bad act, ["] to wit, the strangling of Gail Katz Bierenbaum to unconsciousness and that was allowed in for certain limiting purposes and I want to make that very clear, as I did at the time such evidence was admitted. The fact that this defendant allegedly committed a prior

bad act is no proof whatsoever that he possessed a propensity or disposition to commit the crime charged in this indictment or any other crime. It is not offered for such a purpose and it must not be considered by you for such a purpose. Instead the People were allowed to offer such evidence or introduce such evidence solely ... as probative of or relevant to or to demonstrate defendant[']s intent[-]as they claim[-]to murder Gail Katz Bierenbaum ... as probative of his identity as the person they claim committed the murder and when they summed up to you and made their arguments, I allowed those arguments on those points. Trial Tr. vol. IV, 3267-68.

FN5. Bierenbaum also takes exception to his trial counsel's failure to object to the prosecution's contention that he prevented a complete forensic examination of the apartment. We addressed this point in connection with counsel's mistake in referring to a "forensic" examination in his opening statement, and found no prejudice.

Bierenbaum's counsel explained that he was concerned that a contemporaneous objection would have prompted the trial court to "sum up" in favor of the prosecution, in other words, to highlight for the jury the argument that counsel found objectionable. The strategy was a reasonable one, given that the trial court would have provided a limiting instruction along the lines of the one given in the charge. The Appellate Division concluded that the trial court's cautionary instructions about the prior assault evidence were "legally satisfactory" and adequately protected Bierenbaum's right to a fair trial. *Bierenbaum*, 748 N.Y.S.2d at 583.

9. Failure to request charge on territorial jurisdiction

Prior to trial Bierenbaum's attorney moved to dismiss the indictment, contending*59 that the evidence presented to the grand jury failed to prove that New York had jurisdiction to prosecute him for the murder, because assuming that Katz was dead, there was no evidence that her death occurred in New York. The motion was denied. Bierenbaum argues that his trial counsel was ineffective for failing to request a jury charge to the effect that the prosecution must prove beyond a reasonable doubt that the crime occurred within the state of New York. *See* *People v. McLaughlin*, 80 N.Y.2d 466, 591 N.Y.S.2d 966, 606 N.E.2d 1357, 1359 (1992) ("[F]or the State to have criminal jurisdiction, either the alleged conduct or some consequence of it must have occurred within the State.").

During trial the evidence was uncontroverted that Bierenbaum repeatedly stated to friends, to relatives and to the police that he last saw his wife in their apartment in Manhattan. Bierenbaum's only witness was Joel Davis, who saw a poster of the missing Katz and reported sighting her on a Manhattan street on the afternoon of Sunday, July 7.

Bierenbaum suggests now that a jury could have concluded that if he killed his wife on July 7, 1985, he might have done so in New Jersey and not in New York. It was a reasonably defensible legal strategy to conclude that on the state of the evidence at trial the jury should be asked to make a choice between two, not three theories of the case. If the jury harbored a reasonable doubt concerning Bierenbaum's guilt, an

instruction on jurisdiction would not have assisted the defense. If the jury concluded beyond a reasonable doubt that Bierenbaum committed the murder, the jurors would not have harbored a reasonable doubt that it occurred in the apartment. Defense counsel could reasonably have concluded that it made no sense to request a territorial jurisdiction instruction-unsupported by any evidence-that contradicted the defense's theory of the case, that Katz left the apartment alive and was alive that afternoon on the streets of Manhattan.

None of the alleged errors, individually or collectively, amount to constitutionally deficient representation. It follows that the state court's rejection of Bierenbaum's ineffective assistance of counsel claim was not an unreasonable application of the *Strickland* standard. *See Hemstreet v. Greiner*, 491 F.3d 84, 90 (2d Cir.2007).

CONCLUSION

The district court's denial of petitioner's application for a writ of habeas corpus is affirmed.

CALABRESI, Circuit Judge, concurring dubitante:

I join Judge Sessions's opinion fully because I believe it to be correct on the law. I add a few words because this case troubles me. I believe the representation given to Appellant by his trial counsel left a lot to be desired, though, for the reasons stated in Judge Sessions's opinion, it does not ultimately amount to constitutionally inadequate representation. I also believe that the evidence of guilt is very thin. The sufficiency of the evidence, however, is not before

us. All this means that the decision of the district court is properly affirmed.

United States Court of Appeals
For The
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 23rd day of August, two thousand and ten.

Robert Bierenbaum,

Petitioner-Appellant,

v.

Harold D. Graham, the Superintendent of Auburn Correctional
Facility, Andrew Cuomo, Attorney General State of New York,

Respondents-Appellees.

Docket No. [s] : 08-1375 –pr

Robert Bierenbaum having filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*, and the panel that determined the appeal having considered the request for panel rehearing, and the active members of the Court having considered the request for rehearing *en banc*,

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

AFFIDAVIT OF JUNE SHERMAN

STATE OF *ARIZONA*)
COUNTY OF MARICOPA) ss. :

BEFORE ME, the undersigned authority, this day personally appeared JUNE SHERMAN, who after being duly sworn, deposes and says:

1. My name is June Sherman, I am 79 years old and reside at 11327 W. Aleppo Drive, Sun City West, Arizona.

2. My husband and I purchased the above property in 1980. We have lived there since 1989.

3. Between 1980 and 1989, my husband and I lived at 185 E. 85th Street, Apt. 11B, in New York City, NY.

4. Robert and Gail Bierenbaum lived directly above us in Apt. 12B.

5. Gail Bierenbaum was a very noisy neighbor. She frequently screamed at her husband and vacuumed late at night, making noise as she moved furniture around in her high-heeled shoes.

6. I remember the morning Gail Bierenbaum disappeared. She was screaming at someone and I could hear her high heels making noise on the floor of her apartment. The I heard the door of their apartment slam and both her shouting and the sound of her high heels on the floor stopped. There was no further noise or commotion from the apartment above me following the slamming of the

door.

7. Based upon my familiarity with Mrs. Bierenbaum's footsteps and voice, I believe that she left the apartment when the door slammed.

8. I was previously interviewed by a Detective from the New York City Police Department.

9. I was never contacted or interviewed by any defense investigators working for Dr. Bierenbaum or his lawyers.

10. I was never interviewed by any lawyers who represented Dr. Bierenbaum prior to the trial, either by telephone or in person.

11. None of the lawyers who represented Dr. Bierenbaum ever contacted me and requested me to appear at trial. I would have done so if asked.

12. I was available to appear at trial in the fall of 2000 and made no attempt to avoid process or avoid appearing at the trial. I was unaware of any attempts made to subpoena me. Both my address and phone number were listed in the phone directory.

13. The New York City Police Department was aware of my location during the trial and kept in contact with me prior to and during the trial, finally informing me my testimony would not be needed.

FURTHER AFFIANT SAITH NAUGHT.

JUNE SHERMAN

SWORN AND SUBSCRIBED TO before me this 25th day of July 2004.

Personally known_____ or produced identification x

Type of Identification produced. AZ DL

OFFICIAL SEAL
LA QUITA J. SAUTER
NOTARY PUBLIC-ARIZONA
MARICOPA COUNTY
My Comm. Expires *June* 11, *2006*